91-1198

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal courts have jurisdiction, under the federal statute that prohibits state tax discrimination against railroads, to determine whether a state's property tax valuation methodology results in discriminatory overvaluation of railroad property.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

The parties to the proceeding in the court below were Chesapeake Western Railway; CSX Transportation, Inc.; Interstate Railroad Company; Norfolk and Western Railway Company; Richmond, Fredericksburg and Potomac Railroad Company; Southern Railway Company; William H. Forst, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; David E. Jordan, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; City of Alexandria, Virginia; County Board of Arlington County, Virginia; County of Fairfax, Virginia; County of Prince William, Virginia; and County of Hanover, Virginia. Southern Railway Company has subsequently changed its name to Norfolk Southern Railway Company.

Petitioners before this Court are Chesapeake Western Railway, CSX Transportation, Inc., Interstate Railroad Company, Norfolk and Western Railway Company, Norfolk Southern Railway Company, and Richmond Fredericksburg and Potomac Railroad Company.

The parent company of petitioner Chesapeake Western Railway is petitioner Norfolk and Western Railway Company, whose parent companies are listed below. Chesapeake Western Railway has no subsidiaries.

The parent company of petitioner CSX Transportation, Inc. is CSX Corporation. The subsidiaries of CSX Transportation, Inc. that are not wholly-owned subsidiaries are:

The Akron Union Passenger Depot Company

Allegheny & Western Railway Company (sold to Buffalo & Pittsburgh Railroad, Inc., but shares held in escrow pursuant to escrow agreement)

Augusta and Summerville Railroad Company

The Baltimore and Cumberland Valley Rail Road Extension Company

Beaver Street Tower Company

Central Transfer Railway and Storage Company

Chatham Terminal Company

Clearfield & Mahoning Railway Company (sold to Buffalo & Pittsburgh Railroad, Inc., but shares held in escrow pursuant to escrow agreement)

The Cleveland Terminal & Valley Railroad Company

Dayton and Michigan Railroad Company

Dayton and Union Railroad Company

The Home Avenue Railroad Company

The Lakefront Dock and Railroad Terminal Company

Nicholas, Fayette and Greenbrier Railroad Company

North Charleston Terminal Company

Winston-Salem Southbound Railway Company

Woodstock & Blocton Railway Company

The parent company of petitioner Interstate Railroad Company is petitioner Norfolk Southern Railway Company, whose parent company is listed below. Interstate Railroad Company has no subsidiaries.

The parent company of petitioner Norfolk and Western Railway Company is petitioner Norfolk Southern Railway Company, whose parent company is listed below. The only subsidiary of Norfolk and Western Railway Company that is not a wholly-owned subsidiary is Winston-Salem Southbound Railway Company.

The parent company of petitioner Norfolk Southern Railway Company (formerly known as Southern Railway Company) is Norfolk Southern Corporation. The subsidiaries of Norfolk Southern Railway Company that are not wholly-owned subsidiaries are:

Algers, Winslow & Western Railway Company

Augusta and Summerville Railroad Company

Central Transfer Railway and Storage Company

Chatham Terminal Company (through Central of Georgia Railroad Company)

High Point, Randleman, Asheboro and Southern Railroad Company

Mobile and Birmingham Railroad Company

The North Carolina Midland Railroad Company

The South Western Rail Road Company (through Central of Georgia Railroad Company)

State University Railroad Company

Winston-Salem Southbound Railway Company (through Norfolk and Western Railway Company)

Woodstock & Blocton Railway Company (through The Alabama Great Southern Railroad Company)

Yadkin Railroad Company

The parent company of petitioner Richmond, Fredericksburg and Potomac Railroad Company is RF&P Corporation. RF&P Corporation is a subsidiary of System Holdings, Inc., a corporation wholly owned by Virginia Retirement System, a state pension fund and political subdivision of the Commonwealth of Virginia. Richmond, Fredericksburg and Potomac Railroad Company has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Chesapeake Western Railway, CSX Transportation, Inc., Interstate Railroad Company, Norfolk and Western Railway Company, Norfolk Southern Railway Company, and Richmond, Fredericksburg and Potomac Railroad Company respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this case on July 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 938 F.2d 528 (4th Cir. 1991), and is reproduced in the Appendix ("App.") at App. 1a to 10a. The unreported opinion of the United States District Court for the Eastern District of Virginia is reproduced at App. 11a to 14a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1991. A timely petition for rehearing was denied on September 24, 1991. App. 17a. By order dated December 9, 1991, the Chief Justice extended the time for the filing of a petition for certiorari to and including January 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (the "4-R Act"), as recodified at 49 U.S.C. § 11503 (1988), is set forth at App. 19a-21a. Further references will be to the statute as recodified; recodification did not effect any substantive changes. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

STATEMENT OF THE CASE

The issue presented by this petition is one this Court reserved five years ago: whether section 11503 of Title 49, which prohibits discriminatory taxation of railroads, permits the methodology a state uses for valuing railroad property to be challenged as itself discriminatory. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 463 n.5 (1987). In *Oklahoma Tax Commission*, this Court held that section 11503 confers jurisdiction on the federal courts to determine whether a state has overvalued railroad property. However, because methodology was not there in issue, the Court expressed no view as to

> whether a railroad may, in an action under § 11503, challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value, or is instead restricted to challenging the factual determinations to which

> the State's preferred accounting methods were applied.

Id.

The way the court below answered that question opens a gaping hole in the statute, one that threatens its ability to protect railroads against the chronic problem of discriminatory state taxation. The Fourth Circuit held that federal courts have no jurisdiction under section 11503 to hear a claim of tax discrimination if that claim involves a challenge to the state's valuation methods. App. 10a. Thus, even if the methodology selected by a state yields obvious and substantial discrimination against railroads, there would be no recourse under section 11503.

A. The Background of Section 11503

After close study of the distressed financial condition of the Nation's railroads, Congress enacted wide-ranging remedial measures in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (the "4-R Act"). A key component of that statute was relief from state tax discrimination, which Congress estimated had resulted in "railroads [being] over-taxed by at least $50 million each year." *Oklahoma Tax Commission*, 481 U.S. at 454 (citing H.R. Rep. No. 725, 94th Cong., 2d Sess. 78 (1975)).

Section 11503 adopted an antidiscrimination policy designed to curb the "temptation [on the part of state and local governments] to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *Western Airlines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987). The statute has been used as the model for similar measures designed to protect other interstate carriers.[1]

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[1] After 1976, Congress enacted parallel statutes for trucking companies, Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1988)); bus companies, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96

Simply stated, section 11503(b) forbids a state or locality to:

(1) assess railroad property at a value that bears a higher ratio to the true market value of such property than the ratio that the assessed value of all other commercial and industrial property bears to the true market value of such property;

(2) levy or collect any tax based on such an assessment;

(3) levy or collect any ad valorem tax on railroad property at a higher rate than the rate generally applicable to other commercial and industrial property; or

(4) impose any other tax that discriminates against a railroad.

Because Congress was dissatisfied with the remedies available in state courts, section 11503(c) gives federal courts jurisdiction to prevent state tax discrimination against railroads notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1988). To protect the interests of the states, Congress gave them a three-year grace period to bring their taxation practices into compliance, 90 Stat. 54, and specified that only assessment ratio discrimination of over five percent could be enjoined by federal courts. 49 U.S.C. § 11503(c).

Although some states promptly instituted reforms, others sought to perpetuate tax discrimination against railroads by a variety of means. One by one, most of those devices aimed at thwarting the relief Congress granted in section 11503 were prohibited by the federal courts.[2]

Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1988)); and airlines, Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1988)).

[2] *E.g., General Am. Transp. Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986) (Kentucky: railroad cars classified as public utility

In 1987, this Court resolved one recurring issue presented by the states' efforts: whether section 11503 reaches allegations that railroad property had been valued in excess of its true market value, while other commercial and industrial property was valued at or below true market value. In *Oklahoma Tax Commission*, the railroad claimed that the value of its property had been artificially inflated in the state's property tax assessment. In response, the state argued that such "overvaluation" claims were outside the scope of the statute.

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property and taxed at a higher rate of assessed value); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985) (Iowa: taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property); *Louisville & N. R.R. v. Department of Revenue*, 736 F.2d 1495 (11th Cir. 1984) (Florida: tax benefit accorded to owners of other commercial and industrial property, but not to railroads); *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas: railroad real property assessed annually, while other commercial and industrial real property assessed less frequently); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina: railroad property assessed annually, while other real property reappraised and reassessed only every eight years); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860 (9th Cir.) (California: tax rates higher on private rail cars than on other commercial and industrial property), *cert. denied*, 464 U.S. 846 (1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) (Alabama: license tax on railroads); *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.) (North Dakota: taxation of railroad personal property but not other commercial personal property, and discriminatory assessment of railroad property), *cert. denied*, 454 U.S. 1086 (1981); *Burlington N. R.R. v. Bair*, 648 F. Supp. 91 (S.D. Iowa 1986) (Iowa: overvaluation of railroad property); *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) (Arizona: improper classification of "other" commercial and industrial property relative to railroad property); *Louisville & N. R.R. v. Louisville Tax Comm'n*, 498 F. Supp. 418 (M.D. La. 1980) (Louisiana: railroad property classified as "public service" property and assessed at 25% of true market value, while "other" property assessed at 15% of value).

After reviewing the text, structure, and background of the statute, this Court held that section 11503 does reach claims of tax discrimination resulting from the overvaluation of railroad property. As the Court explained, in order to perform the comparison of assessment ratios required under section 11503(b)(1), "it is necessary to determine what the 'true market values' are." *Oklahoma Tax Commission*, 481 U.S. at 461. The Court thus squarely rejected the contention "that whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny." *Id.* at 461-62.[3]

Footnote 5 of the *Oklahoma Tax Commission* opinion, however, observed that in that particular case the railroad had "not challenged the valuation methodology employed by respondents in determining the value of petitioner's railroad; petitioner's sole challenge is to the application of that methodology." *Id.* at 463 n.5. As a result, the Court "express[ed] no view" as to whether a challenge to a state's methodology would be within the reach of section 11503. *Id.*

Even after *Oklahoma Tax Commission*, some states have continued imposing discriminatory taxes on railroads, again seeking to conceal or defend such taxes in a variety of novel ways.[4] One of the most fertile areas

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[3] As a fallback, the states argued that only *intentional* overvaluation was prohibited by section 11503. The Court also rejected that theory, holding that the "interpolation of an intent requirement draws no support from the statute's language and is inconsistent with its expressed purpose." *Id.* at 464.

[4] *See, e.g., Trailer Train Co. v. State Tax Comm'n*, 929 F.2d 1300 (8th Cir.) (Missouri: private car tax imposed solely on freight line companies), *cert. denied*, 112 S. Ct. 169 (1991); *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991) (Wisconsin: occupational tax on owners and operators of "iron ore concentrates docks" affected only railroads as sole operators of such docks); *Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416 (8th Cir. 1988) (Nebraska: tax on personal property of railroads, while exempting majority of commercial and industrial personal property in state), *cert. denied*, 490 U.S. 1066 (1989); *Kansas City S. Ry. v. McNamara*,

of litigation is the issue left open by footnote 5: states have been seeking dismissal of section 11503 claims on the ground that they involve challenges to methodology and thus allegedly lie beyond the reach of the statute.

B. Virginia's Taxation of Railroad Property

In Virginia, railroads are subject to a property tax, assessed centrally but collected by the various cities and counties. From early in this century until the 1984 tax year, assessment responsibility was assigned to the Virginia State Corporation Commission ("VSCC"), which used what it termed an "inventory and summation" method of valuing railroad property. App. 2a-3a.

Under the VSCC method, railroad land is valued based on the use and value of the land adjacent to it. App. 2a.[5] Because railroad rights-of-way often extend uninterrupted for many miles, this "across-the-fence" approach requires that a rail yard or corridor be artificially divided into "parcels" and each resulting parcel compared to the property next to, or across the fence from, it. For railroad property other than land, including roadway, track and operating improvements, value is calculated based on its original cost less depreciation. App. 2a-3a. For a given segment of railroad property, these two approaches are combined. For instance, the depreciated cost of rail and ties is added to the value of railroad land, even though that land has been valued under the across-the-fence approach on the basis of a presumed non-railroad use. *See* App. 2a-3a.

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817 F.2d 368 (5th Cir. 1987) (Louisiana: tax on the intrastate gross receipts of "public utilities" included only railroads and a few other business taxpayers); *ACF Indus. v. California State Bd. of Equalization*, No. C-89-3449 (N.D. Cal. filed Sept. 13, 1991) (order) (California: true market value of railroads overstated because of chosen valuation methodology and its erroneous application).

[5] Virginia also draws a distinction between operating and non-operating land for purposes of railroad property valuation, but non-operating land is not at issue in this case.

Railroads have challenged Virginia's valuation of their property in state court, with little or no success.[6] In 1984, the Virginia General Assembly re-assigned responsibility for assessment of railroad property to the Virginia Department of Taxation ("VDOT"). After a study of the valuation process, VDOT concluded that the inventory and summation method did not determine the true market value of railroad property, and therefore decided to abandon that method.[7] In its place, VDOT adopted a unitary valuation methodology, based principally on capitalized income, similar to the methods used by most other states.[8] That capitalized income approach was also similar to the way local tax assessors in many states value other commercial and industrial property, an approach recognizing that "[i]ncome-producing property is typically purchased for investment purposes" so that "earning power is the critical element that affects the property's value."[9]

Dissatisfied with the lower tax revenues they received as a result of the change, the City of Alexandria and the

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[6] *E.g., Richmond, F. & P. R.R. v. State Corp. Comm'n*, 230 Va. 260, 336 S.E.2d 896 (1985); *City of Alexandria v. Richmond, F. & P. R.R.*, 223 Va. 293, 288 S.E.2d 457 (1982); *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 219 Va. 301, 247 S.E.2d 408 (1978); *Norfolk & W. Ry. v. Commonwealth*, 211 Va. 692, 179 S.E.2d 623 (1971); *Southern Ry. v. Commonwealth*, 211 Va. 210, 176 S.E.2d 578 (1970); *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 124 S.E.2d 206 (1962).

[7] App. 3a; *see* App. 27a (David E. Jordan Deposition at 24-25 (Sept. 14, 1990)).

[8] App. 3a; *see County Bd. v. Virginia Dep't of Taxation*, 240 Va. 108, 393 S.E.2d 194, 196-97 & n.4 (1990). Most states that impose a property tax on railroads value the railroad as a whole and then apportion that value to the states and localities in which the railroad operates. *See Oklahoma Tax Commission*, 481 U.S. at 459; *see also infra* at 17-18 & n.20 (various approaches to calculating full system value).

[9] American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 333 (8th ed. 1983).

County of Arlington contested the new methodology. In a case arising solely under Virginia law and not under section 11503, the Virginia Supreme Court held that use of a unitary approach to valuation was impermissible under the Virginia Constitution. *County Bd. v. Virginia Dep't of Taxation*, 393 S.E.2d 194 (Va. 1990).

Thereafter, VDOT made no apparent effort to identify a methodology that would both satisfy state constitutional requirements and produce non-discriminatory valuations of railroad property. Instead, on July 18, 1990, it simply reverted to the previously discarded inventory and summation methodology, with its higher assessed values. App. 3a.

C. The Proceedings Below

On August 24, 1990, petitioners filed this action in the United States District Court for the Eastern District of Virginia. Invoking federal jurisdiction under section 11503 and seeking injunctive relief, they alleged that valuations produced by Virginia's reestablished inventory and summation methodology would inevitably result in tax discrimination against the railroads for the tax year 1990, as to which railroad property assessments were to be announced in September 1990. While the action was originally brought against VDOT, the local jurisdictions that are respondents in this Court were permitted to intervene as defendants.

Specifically, petitioners alleged that Virginia's reinstated inventory and summation method would result in the valuation of their railroad property at levels well in excess of true market value—at 349 percent of true market value in the case of one petitioner. Because other commercial and industrial property in Virginia is concededly assessed at or below true market value, the excessive valuation of railroad property would violate section 11503.

Both VDOT and the intervenor local jurisdictions answered with denials and filed motions for summary judg-

ment, arguing that petitioners could not challenge Virginia's methodology. Opposing those motions, petitioners pointed to discovery materials showing that Virginia's railroad taxation methodology would produce assessment discrimination prohibited by section 11503.

Petitioners cited in particular the deposition testimony of defendant David Jordan, Assistant Director of VDOT's Property Tax Division, who had held direct responsibility for property tax assessment of railroads since 1984. Mr. Jordan testified that for the relevant tax year, Virginia's "*inventory and summation assessments will be in excess of what, in my personal opinion, would be the market value of* [*the petitioners'*] *rail systems.*" [10] The parties agreed "that all other property in the state is assessed at, or below, the true market value." App. 5a. Mr. Jordan concluded that in his view, the differential between the respective assessment ratios for railroad and for other commercial and industrial property would exceed five percent. App. 31a (Jordan Dep. at 40).

The district court granted the motions for summary judgment, stating that "the language and legislative history of [section 11503] make clear that it does not impose a particular method of taxation on the state . . . ." App. 13a.[11] Petitioners then appealed to the Fourth Circuit, which affirmed.

The Fourth Circuit recognized that the petitioners' allegations of substantial, methodology-driven overvaluation of their railroad property would, if proven, establish discrimination. As the court below stated:

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[10] App. 30a (Jordan Dep. at 39) (emphasis added). Mr. Jordan gave specific reasons for his conclusion, pointing to several analytical deficiencies in Virginia's inventory and summation approach. *See* App. 11a-12a, 25a-26a, 28a-29a (Jordan Dep. excerpts).

[11] The district court ruled from the bench on September 20, 1990, then issued a memorandum opinion and final judgment order dated October 3, 1990.

> If the railroads are correct, this means that the ratio of assessed value to true market value for railroad property is therefore greater than one. The parties agree that all other property in the state is assessed at, or below, true market value.

App. 5a. Nonetheless, the Court of Appeals held that section 11503 "does not provide a basis for parties to challenge a state's preferred accounting method." App. 5a. On this issue, the court found the statute itself to be ambiguous and the legislative history to be "thin." App. 6a. It consequently turned to other considerations, resting its decision primarily on the "general proscription on federal interference in state taxation decisions" and on its perception of the "difficulty of judicial enforcement of any alternative understanding" of section 11503. App. 7a.[12]

REASONS FOR GRANTING THE WRIT

The decision below creates an expansive exception to the prohibitions on discriminatory state taxes that Congress mandated in section 11503. It is an open invitation for state tax officials to devise discriminatory methods for valuing railroad property—an invitation that will be particularly seductive in this time of straitened public budgets and acute political aversion to general tax increases. If this discrimination is allowed to go unchecked, the prohibitions that Congress enacted in section 11503 will be readily evaded and deprived of all practical effect.

The court below held that section 11503 does not permit federal courts to entertain challenges to discriminatory state methods of valuing railroad property. In doing so, it purported to resolve the issue this Court reserved in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S.

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[12] Subsequent to the Fourth Circuit's decision, petitioner Richmond, Fredericksburg and Potomac Railroad Company sold its railroad operating assets to an affiliate of petitioner CSX Transportation, Inc., and no longer engages in providing rail service.

454, 463 n.5 (1987). The Fourth Circuit's decision, however, finds no support in the statute.

Congress enacted section 11503 to end the long and persistent history of state tax discrimination against railroads. Railroads have always been obvious targets, as taxes could be imposed on them with little risk of voter retaliation. Neither state court review nor periodic review by this Court in constitutional cases had been effective in restraining such discrimination. When Congress took action, after fifteen years of study, it legislated comprehensively: the text, structure, and history of section 11503 all manifest the goal of ending *all* forms of state tax discrimination against railroads.

Early decisions applying section 11503 invalidated the more obvious forms of property tax discrimination. Some states then turned to what they may have viewed as a subtler form of discrimination—overvaluing railroad property—and argued, in the teeth of the statutory terms, that a state's valuation of railroad property was immune from scrutiny under section 11503. This Court rejected that argument in *Oklahoma Tax Commission*, holding that section 11503 means what it says: it forbids a valuation of railroad property that is disproportionately high in relation to true market value as compared with the valuation of other commercial and industrial property. 481 U.S. at 461.

There is no basis in the statute's text, context, purpose, or history for excepting a disproportionately high valuation that results from a state's choice of valuation methodology rather than from its application of that methodology. The Fourth Circuit, however, has endorsed just such an exception, one so elastic that it could well become a black hole that swallows much of the protection the statute now affords. If states can extract disproportionate tax revenues from railroads and other interstate carriers by the simple expedient of devising a methodology that leads

to the overvaluation of their property, the comprehensive protection that Congress sought to guarantee will be lost.

The violence that an exception for "methodological" discrimination will do to the statute—coupled with the lack of any genuine distinction between methodology and application in this context—has led other courts to different conclusions than those below. The Court of Appeals for the Eighth Circuit has declined to adopt such a distinction, expressing serious doubt as to its validity. *Burlington N. R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990). Other courts have already seconded the Eighth Circuit's view.[13] However, two district courts have seized on this questionable distinction to dispose of cases brought under section 11503.[14] This divergence, taken with the mischief that will result if the Fourth Circuit's rule is allowed to stand as an enticement to state and local budget makers, argues strongly for this Court to resolve the issue now, in the only way the text of section 11503 permits it to be resolved.

I. THE FOURTH CIRCUIT WRONGLY DECIDED AN ISSUE OF CRITICAL IMPORTANCE TO SECTION 11503'S PROHIBITION OF STATE TAX DISCRIMINATION AGAINST RAILROADS

A. Immunizing Discriminatory State Tax Methodologies From Challenge Would Defeat the Statute

After studying the problem for over fifteen years, Congress was well aware in 1976 of the variety and per-

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[13] *ACF Indus. v. California Board of Equalization*, No. C-89-3449, slip op. at 27 n.4 (N.D. Cal. Sept. 13, 1991) (copy of opinion lodged with the Court); *see also CSX Transp. v. Forst*, No. 3:91CV0048, 1991 U.S. Dist. LEXIS 16355 (E.D. Va. Nov. 6, 1991) (copy of opinion lodged with the Court).

[14] *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 552 (D. Utah 1988); *Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991) (copy of opinion lodged with the Court).

sistence of state tax discrimination against railroads, and the statute it enacted was a comprehensive one. Section 11503 deals extensively with state and local property taxes, which were the most common means of tax discrimination against the railroads. The statute prohibits the assessment of railroad property at a value disproportionate to the assessment of other commercial and industrial property, 49 U.S.C. § 11503(b)(1); the levy or collection of a tax based on a prohibited assessment, *id.* § 11503(b)(2); and the taxation of railroad property "at a tax rate that exceeds the tax rate applicable to commercial and industrial property" in the same taxing jurisdiction, *id.* § 11503(b)(3). It then goes on to prohibit *any other tax* that discriminates against a railroad. *Id.* § 11503(b)(4).[15]

The entire structure of the statute manifests its intent to prohibit *all forms* of state tax discrimination against railroads. To permit discriminatory taxation merely because it results from the state's choice of methodology would read an implied exception into subsection (b)(1) and turn a blind eye to the catch-all prohibition of subsection (b)(4).[16] In sum, "[a]doption of [the decision below] would require amendment rather than construc-

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[15] As originally enacted, this catch-all subsection prohibited "any other tax which results in discriminatory treatment" of a railroad. 90 Stat. 31, 54 (1976). As re-codified, the reference is to "another tax that discriminates against" a railroad. 49 U.S.C. § 11503(b)(4). Subsection (b)(4) has been interpreted to apply to property taxes as well as other types of taxes. *E.g., ACF Indus. v. Department of Revenue*, 946 F.2d 1414, 1422 (9th Cir. 1991); *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040-41 (11th Cir. 1981).

[16] A catch-all makes sense only if Congress intended a comprehensive prohibition. Had Congress meant to leave a loophole as big as the supposed methodology exception, there would have been little reason for subsection (b)(4): states seeking to evade the statute would have had no need to try other, less obvious types of discrimination.

tion of the statute, and it must be rejected here." *Oklahoma Tax Commission*, 481 U.S. at 463.

The statute's assessment or valuation provision, subsection (b)(1), is necessarily somewhat complex because it deals with the proportionality of four elements. Yet as this Court indicated in *Oklahoma Tax Commission*, 481 U.S. at 461, that provision is unambiguous. As the Court explained, "[s]ubsection (b)(1) forbids any State to 'assess rail transportation property at a value that has a higher ratio to the true market value . . . than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.'" *Id.* (quoting 49 U.S.C. § 11503(b)(1)). The Court found it "clear from this language that in order to compare the actual assessment ratios, it is necessary to determine what the 'true market values' are." *Id.* The position taken by the Fourth Circuit below is little more than an echo of the argument rejected in *Oklahoma Tax Commission*: "in essence that whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny in the federal courts." *Id.* at 461-62. Here, as there, that position "depends upon the addition of words to a statutory provision which is complete as it stands." *Id.* at 463.

There is nothing whatever in the statute to suggest that methodology-based discrimination is immune from review. As the United States pointedly observed in the *Oklahoma Tax Commission* case:

> Section [11503] prohibits any overvaluation of railroad property that results from an assessment rule or methodology that—either on its face or as applied—systematically determines excessive values for railroad property.[17]

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[17] Brief of United States as Amicus Curiae In Support of Petition for Certiorari at 11, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986).

The opposite result would be ironic indeed: a statute that prohibits discrimination in the finer points of property tax valuation but would permit wholesale discrimination through the adoption of result-oriented valuation methodologies.

This case provides a graphic illustration of how a particular valuation methodology can result in discrimination against railroads. Virginia's own chief railroad property tax assessor has admitted that assessments under the inventory and summation approach would—for reasons inherent to that approach—substantially exceed the true market value of petitioners' property. *See supra*, at 10 & n.10. Challenging the *application* of Virginia's chosen methodology, as expressly permitted by *Oklahoma Tax Commission*, cannot reach the root of the discrimination. Virginia's methodology itself is the culprit.

The question before this Court is not, of course, whether Virginia's methodology does or does not discriminate against railroads; it is whether petitioners are entitled to an opportunity to prove that it does. By holding that methodology is not within the ambit of the statute, the Fourth Circuit immunized such discrimination from scrutiny under section 11503. But unless railroads can challenge methods that cause discrimination, the statutory prohibitions will be easy to evade, with the inevitable result of reviving the very discrimination that Congress sought to end.[18]

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[18] As this Court has often observed, a statute should not be interpreted in a way that would make it ineffective. *See, e.g., Secretary of Interior v. California*, 464 U.S. 312, 359 (1984); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *United States v. Shirey*, 359 U.S. 255, 259-60 (1959); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940); *Graham & Foster v. Goodcell*, 282 U.S. 409, 421-22 (1931).

B. The Fourth Circuit's Reasoning Is Contrary To That Of This Court In Its *Oklahoma Tax Commission* Decision

The Fourth Circuit cited no specific statutory basis for its decision, and although it attempted to draw support from *Oklahoma Tax Commission*, nothing in footnote 5 or elsewhere in that opinion actually lends support to the distinction between methodology and application created below.[19] To the contrary, the Fourth Circuit simply ignored a fundamental point this Court made in *Oklahoma Tax Commission*: that the pertinent language of section 11503 is plain and unambiguous. 481 U.S. at 461. Such plain language cannot bear within it an implied exception as significant and expansive as that announced below.

Rather than looking to the statute's plain language, the Fourth Circuit relied heavily on the "general proscription in the Tax Injunction Act on federal interference in state taxation decisions." App. 6a, 10a. In *Oklahoma Tax Commission*, however, this Court expressly noted that section 11503 "declared an exception from the provisions of the Tax Injunction Act," 481 U.S. at 457-58, and rejected arguments that an injunction against a state tax would offend principles of comity. The Court said that this was among the "policy considerations which may have weighed heavily with legislators," but which the courts "are not free to reconsider." *Id.* at 464.

The court below also adverted to the legislative history of section 11503 and sought support for its decision in fragments of early testimony that the legislation then proposed "would not deal with valuation being standard." App. 6a-7a. But the fact that the statute does not prescribe a single standard methodology is no indication that

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[19] While footnote 5 noted the theoretical possibility of such a distinction, it in no way endorsed one. Indeed, the methodology loophole now claimed to be an integral aspect of section 11503 was virtually invisible for the decade from the statute's passage until this Court posed the hypothetical in *Oklahoma Tax Commission*.

a discriminatory one is to be immunized from review.[20] In addition, the lower court overlooked the fact that these fragments of testimony occurred early in the fifteen-year legislative process, well before the language of the statute was broadened to prohibit any other tax that discriminates against a railroad. *See supra*, at 14 & n.15. In any event, the Fourth Circuit itself recognized the "thinness" of the legislative history, which this Court treated as "inconclusive and irrelevant" in *Oklahoma Tax Commission*. 481 U.S. at 461.

Beyond this, the decision below appears to have turned on the Fourth Circuit's professed concern for "the difficulty of judicial enforcement" of challenges to valuation methodologies, and a belief that courts are ill-equipped to determine true market value, which it described as "inherently an approximation, in some sense a fiction." App. 7a. In this respect, the lower court seems to have been heavily influenced by a single district court decision, *Union Pacific R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 552 (D. Utah 1988). *See* App. 7a-9a.[21] In *Union Pacific*, the Utah district court expounded at length about the difficulties it had encountered in deciding the case on the merits after a six-week trial dominated by expert testimony advancing competing valuation methodologies for railroad property. In the end, the district court held that the state's valuation methodologies were beyond the reach of the statute, "at least as long as the

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[20] For instance, states that calculate railroad property tax based on allocated full system value use a variety of approaches and factors, including capitalized income, stock and debt values, and historical costs. *See generally* James F. Runke & Alan E. Finder, *State Taxation of Railroads and Tax Relief Programs* 23-32 (Ralph J. Marcelli ed., 1977).

[21] The court below also cited with approval *Burlington N. R.R. v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984). *See* App. 6a. *Lennen* was the principal basis for the Tenth Circuit decision that was reversed by this Court in *Oklahoma Tax Commission*.

methodology chosen had a rational basis and was not chosen for a discriminatory purpose." 716 F. Supp. at 553.[22]

But a market value determination under section 11503 is not appreciably different from the valuation determinations routinely made by courts in condemnation, estate tax, shareholder assessment, and other proceedings, where decisions often are based on expert testimony. More important, this Court has already ruled that under section 11503, "it is necessary [for the courts] to determine what the 'true market values' are." *Id.* at 461. The task assigned by Congress cannot be shirked merely because it may not always be an easy one.

C. The Distinction Between Valuation Methodologies and Their Application Is Illusory and Unworkable

With millions of tax dollars at stake, great pressures will be brought to bear on the distinction the Fourth Circuit has drawn between "methodology" and "application." States will make every conceivable effort to funnel borderline cases into the "methodology" zone. But lacking any legislative foundation or analytical basis, the purported distinction is bound to create enormous controversy and confusion.

There are already strong indications that the distinction is unworkable. When the Eighth Circuit examined the issue, it concluded that "in cases like this the line between 'methodology' and 'application' is so thin as to be almost ephemeral." *Burlington N. R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990) (permitting section 11503 action to proceed). Likewise, one federal district court recently observed that, even though "helped by the

[22] That reasoning is obviously indefensible: the absence of "discriminatory purpose" cannot possibly be determinative in view of this Court's holding that "an intent requirement draws no support from the statute's language and is inconsistent with its expressed purpose." *Oklahoma Tax Commission*, 481 U.S. at 463-64.

expert testimony to date, [the court] can find no clearly objective basis to make a meaningful distinction between methodology and application issues." *ACF Indus. v. California Bd. of Equalization*, No. C-89-3449, slip op. at 27 n.4 (N.D. Cal. Sept. 13, 1991).[23]

Even the district court that granted summary judgment in this case has since had difficulty in applying the distinction adopted by the Fourth Circuit. *See CSX Transp. v. Forst*, No. 3:91CV00488, 1991 U.S. Dist. LEXIS 16355 (E.D. Va. Nov. 6, 1991). The court noted that "[t]he real question presented, of course, is how one makes a distinction between 'method' and 'application.'" *Id.* at *22. It went on to point out that, while under the Fourth Circuit decision Virginia "is free to *choose* its preferred methodology for ascertaining the true market value for railroad property," it "cannot shield itself from any and all challenges to its taxation of railroad property by a blanket statement that such challenges constitute attacks on Virginia's taxation methodology." *Id.* at *22-23 (emphasis added). In light of "the admitted complexity of the issues involved," the court committed the case before it to trial instead of granting summary judgment. *Id.* at *23.

As these cases demonstrate, judicial resources are now being expended on the artificial threshold question whether the alleged tax discrimination results from the "methodology" or the "application" thereof. That effort has been in derogation of the real issue that section 11503 in plain language requires the courts to address: whether railroad property is being assessed in excess of

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[23] The court permitted one methodology challenge to go forward. In an earlier case, the same court had found that "[i]t is readily apparent that the issue of methodology is inextricably bound up in all of plaintiffs' valuation challenges. . . ." *ACF Indus. v. California State Bd. of Equalization*, 653 F. Supp. 390, 394 (N.D. Cal. 1986). *See also Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991).

its true market value. The decision below thus leads into a fresh thicket of federal litigation over state taxation of railroads, without in any way serving the statute's goals.[24]

II. PROMPT GUIDANCE BY THIS COURT IS NEEDED TO END CONFUSION IN THE LOWER COURTS

The Fourth Circuit is the first court of appeals to adopt the methodology/application distinction advanced by the states. However, the issue had already arisen in the Eighth Circuit, and that court's decision in *Burlington N. R.R. v. James* indicates a very different view.[25]

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[24] The potential for additional litigation does not end with the problems of distinguishing methodology from application. If the exception created by the Fourth Circuit stands, the only way for a railroad to challenge a discriminatory tax methodology in federal court would be on constitutional grounds, as was the case before enactment of section 11503. *See, e.g., Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968).

There is no virtue in returning to that old regime. As the legislative history sets forth, prior to the enactment of section 11503 members of this Court had suggested that comprehensive federal legislation offered the best means to address railroad claims of state tax discrimination. *E.g., Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 477 (1959) (Frankfurter, J., dissenting) ("The solution to these problems [of state taxation of interstate commerce] ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities . . . .") (quoted in part in Special Study Group on Transportation Policies in the United States, Senate Comm. on Commerce, National Transportation Policy, S. Rep. No. 445, 87th Cong., 1st Sess. at 450, 477 (1961) (*"Doyle Report"*), *overruled by Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-89 (1940) (Black, J., dissenting) (articulating need for congressional control over state taxation of interstate commerce) (*quoted* in *Doyle Report, supra*, at 473).

[25] While petitioners brought it to the attention of the Fourth Circuit on brief and on petition for rehearing, *James* was not cited, let alone distinguished, in the decisions below.

James involved a challenge to Minnesota's taxation of railroad property. The district court had dismissed the complaint for lack of jurisdiction on the theory that "the dispute [was] one that challenged 'the appropriateness of Minnesota's chosen valuation method' " and that section 11503 "did not give it the authority to make such an assessment." 911 F.2d at 1299. As authority, the district court in *James*—like the Fourth Circuit in this case—had relied on footnote 5 of *Oklahoma Tax Commission* and on *Union Pacific*. *See id.* at 1300-01.

The Eighth Circuit reversed. It initially noted that the parties' stipulation "at least arguably framed the issue as one involving application of an accepted methodology," which was clearly "sufficient to survive the jurisdictional hurdle." *Id.* at 1301. The court, though, was obviously skeptical of the purported distinction between methodology and application. *See supra*, at 19. The Eighth Circuit went on to state that even if the case might require "competing methodologies" to be weighed against one another, the railroad "unquestionably has presented a colorable allegation that the methodology used by Minnesota has resulted in a discriminatory tax. That allegation alone is sufficient to establish subject matter jurisdiction." *Id.* at 1301.

The Eighth Circuit also found the district court's reliance on *Union Pacific* to have been misplaced and, relying on *Oklahoma Tax Commission*, rejected the proposition that a state's valuation methodology may be " 'disturbed' " only if " 'chosen with the intent of overvaluing railroads.' " *Id.* at 1301 (quoting *Union Pacific*, 716 F. Supp. at 557). Finally, the Eighth Circuit concluded that the "common law principle of federal deference to state tax schemes, as amplified by 28 U.S.C. § 1341, has no place in a section [11503] analysis," because subsection 11503(c) "explicitly forecloses reference to § 1341." *Id.* at 1300.

The positions of the Fourth and Eighth Circuits are thus essentially opposed on the question presented by this case.[26] The disarray in the lower courts is, predictably, expanding. Since the decision below, at least one other district court has elected to adopt the Fourth Circuit rule, again relying on footnote 5 of *Oklahoma Tax Commission* and on the *Union Pacific* case. *See Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518(T)WD & C90-5417(T)WD, slip op. at 6-7 (W.D. Wash. Nov. 27, 1991). That court conceded that it "may not be possible to draw a bright line between an attack on the state's methodology and an attack on its application of that methodology," but found nonetheless that such a distinction was warranted because of the factors addressed by the Fourth Circuit below and a Washington statute giving a "presumption of correctness" to state assessments. *Id.*

On the other hand, a California district court has continued to reject the contention that a state's "selection of a valuation methodology" is insulated from challenge. *ACF Indus. v. California Bd. of Equalization*, No. C-89-3449, slip op. at 25 n.3 (N.D. Cal. Sept. 13, 1991). That court noted that this issue had been left undecided in *Oklahoma Tax Commission*, but "permitted the plaintiff

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[26] There is some indication that the Ninth Circuit, like the Eighth Circuit, does not exclude methodology challenges from the scope of section 11503. In *Atchison, T. & S. F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), *abstention order vacated in* 828 F.2d 9 (9th Cir. 1987), the Ninth Circuit summarized the district court's findings, noting:

> In Phase I the district court conducted a thorough study of the Board's methodology, including a comparison of the methodology for railway property and that for other commercial and industrial property. . . . The court found no discrimination.

Id. at 1445 n.8. While this part of the district court's decision apparently was not appealed, it is significant that the Ninth Circuit made no comment on the fact that the district court allowed a challenge to methodology to proceed.

to introduce evidence related to both" methodology and application, in large part because it found the asserted distinction between the two to be meaningless. *Id.* at 27 n.4. Thus, the California district court found it easier to decide from all the evidence before it what the true market value of the plaintiff's property actually was than to sort out the methodology-versus-application dispute.

As these cases show, the issue left open by the *Oklahoma Tax Commission* footnote has proven to be far from hypothetical. Some courts have used the very fact that the issue was reserved by this Court as a substitute for textual analysis of the statute, enabling them to escape a task they find unattractive but Congress has required them to perform. Other courts have followed the literal mandate of the statute, and there clearly is no middle ground.[27]

The time for review is now. A safe harbor for methodology-based discrimination will prove to be no small loophole in the statute. If the Fourth Circuit's decision is not overturned, states and localities, working with expert consultants, can surely be expected to devise "methodologies" tailored to their own circumstances and designed to result in substantial overvaluation of railroad property. This case, which was disposed of by the court below on jurisdictional grounds, presents the issue cleanly, unencumbered by factual disputes. Because of the importance of this issue, prompt review by this Court is needed to end the confusion in the lower courts and to preserve the integrity of the statute.

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[27] The only intermediate position that has been suggested—that methodology-based discrimination may be challenged, but only when it is intentional—is plainly untenable under *Oklahoma Tax Commission*. *See supra*, at 18-19 & n.22.

CONCLUSION

For these reasons a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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January 23, 1992

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 90-2920

CHESAPEAKE WESTERN RAILWAY; CSX TRANSPORTATION, INCORPORATED; INTERSTATE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY; SOUTHERN RAILWAY COMPANY,

Plaintiffs-Appellants,

v.

WILLIAM H. FORST, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; DAVID E. JORDAN, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; CITY OF ALEXANDRIA; COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA; COUNTY OF FAIRFAX; COUNTY OF PRINCE WILLIAM, VIRGINIA; COUNTY OF HANOVER, VIRGINIA,

Defendants-Appellees.

Argued April 11, 1991

Decided July 12, 1991

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and HAMILTON, District Judge for the District of South Carolina, sitting by designation.

OPINION

PHILLIPS, Circuit Judge:

Chesapeake Western Railway and several other railroads which operate in Virginia appeal the decision of

the district court granting summary judgment on behalf of the state tax commissioner and upholding Virginia's method of valuing railroad property. The companies contend that Virginia's valuation method for railroad property impermissibly discriminates against railroads by valuing railroad property in excess of its true market value. This, they contend, violates § 306 of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act), Pub.L. No. 94-210, 90 Stat. 54, now codified at 49 U.S.C. 11503.[1] Because we hold that challenges to state valuation methods are not cognizable under § 306, we now affirm.

I

From early in this century until the 1984 tax year, the state of Virginia assigned the responsibility of assessing railroad property, for the purposes of *ad valorem* taxation, to the Virginia State Corporation Commission (SCC). The SCC was assigned the task of valuing railroad property at fair market value. In compliance with this mandate, the SCC adopted two methods for valuing railroad property: one for railroad land, and another for railroad property other than land. First, with respect to railroad land, the SCC calculated fair market value by comparing the property with adjacent or nearby industrial and commercial property. This is known as the "across-the-fence" or "over-the-fence" valuation method because it bases the best use and value of the railroad property on the use and value of the land across the fence from the railroad land. The value of railroad property other than land, on the other hand, was based on the original investment in the property, minus a fixed percentage of that investment—varying depending on the particular

[1] Section 306 was originally codified at 49 U.S.C. § 26c, but in 1978 Congress called for recodification of the Interstate Commerce Act. The statute calling for recodification did not make any substantive changes in § 306. *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n. 1 (4th Cir.1983). For the purposes of this opinion, we will simply refer to § 306.

property involved—as allowance for depreciation. These two methods are examples of what is known as the "inventory and summation" approach to assessment.

In 1984, the Virginia legislature transferred the responsibility for assessing railroad property to the Virginia Department of Taxation (DOT). The DOT decided to abandon the SCC's inventory and summation approach, replacing it with the "unit method" of valuation. Under the unit method, the entire railroad is valued as a single property unit, based on the business value of railroad operations. The value of the railroad's property within a given state is then determined based on the proportion of the railroad's total operation which exists within that state. Similarly, the value of the railroad property within any given locality is proportionately based on the extent of that railroad's presence in the locality.

Dissatisfied by the lower tax revenue produced by the unit method, the City of Alexandria and the County of Arlington filed suit in state court to enjoin the use of this method. They argued that use of the unit method of valuation violated the Virginia constitution because it failed to determine the fair market value of railroad property. The Virginia Supreme Court agreed with Arlington and Alexandria. It held that the unit method constituted a business tax rather than a real property tax, and it struck down its use as unconstitutional. *County Board v. Virginia Dep't of Taxation*, 393 S.E.2d 194 (Va.1990). In 1990, the state reverted back to the inventory and summation method, assessing values in the same fashion as the SCC had done prior to 1984.

Appellant railroads proceeded to file suit in the District Court for the Eastern District of Virginia, charging that valuation of railroad property under the inventory and summation methods resulted in such property being assessed at a value greater than true market value. Noting that all other property in the state is valued

at or below fair market value, the railroads argued that Virginia's tax scheme resulted in discriminatorily high taxation of railroad property, in violation of § 306 of the 4-R Act. The district court granted summary judgment to the defendants, finding that "the language and legislative history of the Act make clear that it does not impose a particular method of taxation on the state" and that the expert opinions offered were not sufficiently conclusive to create a factual issue on the question of discriminatory taxation. The railroads now appeal.

II

The railroads argue that the tax scheme discriminates against railroad property in violation of § 306 of the 4-R Act.[2] Section 306 states that:

> [i]t is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

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[2] This is not the first time this claim has been brought against the state. In *Richmond, F. & P. R.R. v. State Corp. Comm'n*, 336 S.E.2d 896, 896-97 (Va.1985), one appellant in this case presented a § 306 discrimination claim before the Virginia Supreme Court. The Court rejected the claim. No issues of collateral estoppel appear to have been raised here.

Section 306 also specifies that:

> no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

The railroads argue that the methods of valuation currently employed by Virginia to determine "true market value" of railroad property in fact produce property values which are far in excess of "true" market value. If the railroads are correct, this means that the ratio of assessed value to true market value for railroad property is therefore greater than one. The parties agree that all other property in the state is assessed at, or below, true market value. Thus, for all property other than railroad property, the ratio of assessed value to true market value is less than, or at most equal to, one. In light of this alleged disparate treatment of railroad property, the railroads argue that Virginia's tax assessment scheme violates § 306.

The question before us is whether § 306 provides a basis for a party to challenge the accounting method by which a state values railroad property. Clearly, a party may challenge a state's *calculations* of true market value, under the state's operative valuation methods, to insure that taxes are not levied discriminatorily. *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461-63, 107 S.Ct. 1855, 1859-61, 95 L.Ed.2d 404 (1987). The Supreme Court has specifically left open the question, however, of whether § 306 allows a railroad to challenge "the appropriateness of the accounting methods by which the state determined the railroad's value." *Id.* at 463 n. 5, 107 S.Ct. at 1861 n. 5.

We believe that § 306 does not provide a basis for parties to challenge a state's preferred accounting method.

As an initial matter, we note that Congress has enacted a general proscription on federal interference in state taxation decisions. *See* 28 U.S.C. § 1341; *Burlington Northern R.R. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983). While § 306 was passed as an express exception to the policy of non-interference, *id.*, we are not inclined to disregard this general policy in areas where § 306 does not plainly authorize such an exception and where the federal courts are ill equipped to evaluate the merits of a challenge to a state taxation scheme. The appellant's position suffers from both of these infirmities.

The Supreme Court has held that § 306 unambiguously provides a basis for railroads to challenge a state's calculation of the true market value of railroad property under whatever accounting system prevails in a given state. *Burlington Northern R.R. v. Oklahoma Tax Comm'n.* 481 U.S. at 461-63, 107 S.Ct. at 1859-61. On the other hand, the statute is not so explicit in explaining whether a railroad may challenge, in addition, the particular accounting method a state has determined to best estimate true market value. Since the statute is ambiguous on this latter question, we turn to the legislative history of § 306.

The legislative history of this section is admittedly rather thin. Nonetheless, although incomplete, the history that does exist suggests that Congress did not intend for courts to displace the state's policy choice about what constitutes the best method for determining true market value of railroad land. The committee report on Senate Bill 927 (a precursor to the legislation here) states that the bill

> does not suggest or require a State to change its assessment standards, assessment practices, or the assessments themselves. It merely provides a single standard against which all affected assessments must be measured in order to determine their relationship to each other. It is not a standard for determining value; it is a standard to which values that have already been determined must be compared.

S.Rep. No. 1483, 90th Cong., 2d Sess. app. B (1968). Similarly, a railroad representative testifying on another earlier version of the 4-R Act stated that it "would not deal with valuation being standard. The standards and methods of valuation that any State wishes to use would be totally unaffected by this legislation." *Hearing Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce on H.R. 16245*, 91st Cong., 1st Sess. 138 (1970) (testimony of Philip M. Lanier), *quoted in*, *Burlington Northern R.R. v. Lennen*, 573 F.Supp. 1155, 1163 (D.Kan.1982). While we might be hesitant to rest our interpretation of § 306 on these materials alone, we are further convinced of the accuracy of our interpretation by the difficulty of judicial enforcement of any alternative understanding of the section.

The job of determining whether a particular valuation method produces a "true" market value involves, at its core, a policy choice. The concept of true market value is inherently an approximation, in some sense a fiction, since there is no such thing as a perfect market. This is particularly true of railroad land which, as the railroads point out, is subject to a good deal of regulation—actual and potential—by federal agencies. The United States District Court for the District of Utah recently has pointed this out in the course of struggling with a claim similar to the one at bar and attempting in the process to select the one valuation method that would produce a truly accurate fair market value.[3] *See Union Pacific R.R.*

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[3] Appellants suggest that they should at least be allowed to prove the present valuation system unreasonable. The problem with this argument is that § 306 does not limit state taxation schemes on the basis of their "reasonableness". It regulates them based on whether or not the ratio of assessed value to true market value of railroad property is at least five percent greater than the ratio of assessed value to true market value of all other property in the state. The statute is clearly designed to preclude a court from doing exactly what appellants request—pass judgment on the reasonableness of a

v. State Tax Comm'n, 716 F.Supp. 543 (D.Utah 1988). There, railroads challenged Utah's methodology used for valuing railroad property. The court allowed the case to go to trial, attempting to determine through the assistance of expert testimony, which valuation method best calculated the true market value of railroad property.[4] At the end of trial, after considering extensive testimony, the court realized the difficult task involved in being asked to disapprove a state's method of valuing property. The court concluded that it could not determine whether the particular valuation method used in Utah discriminated against the railroads because it had no basis for determining which method produced the true market value of railroad property.

The *Union Pacific* court noted that true market value of property is difficult, if not impossible, to ascertain. "[T]here is no absolute way to test the assertions of competing valuations or competing claims of correspondence to 'true market value,' if such a thing exists in the order of things." *Id.* at 553. The court provided a rich explanation of the problem:

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state taxation scheme—and instead is intended to limit consideration to the discrete, quantifiable task of determining the exact extent (if any) of discriminatory assessment.

[4] One particular difficulty in challenging valuation methods under § 306 is that, in order to determine whether the state is discriminating against railroads by a factor of at least five percent, a court is compelled to determine what valuation method is the correct method. That is, we cannot conclude that the state is overtaxing railroads by five percent unless we know what the correct tax would be. To determine what the correct tax would be, we must determine what the correct valuation method is. Thus, we cannot simply reject a particular method as unfair; instead, we must also find that some other specific method is not only fair, but in fact singularly *correct*. As the court in *Union Pacific* pointed out, "[t]he court's decision on valuation must recognize (at least implicitly) one valuation method at the expense of other methods." 716 F.Supp. at 552. In essence, the railroads ask us not only to reject Virginia's inventory and summation approach but also to dictate to Virginia the specific valuation method that produces the "correct" market value.

> From the six weeks of testimony in this case, however, certain things became apparent. First, valuation is an art, not a science. It is a function of judgment, not of natural law. Try as it might, even Congress is incapable of enacting either a natural law of the market or Plato's ideal. "True market value", then, must needs mean something else. Absent a miracle of time, place, and circumstance—willing buyer, willing seller, high noon, January 1, 1984, for example—true market value for the purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers endowed with money and desire, whose desires are said to converge in a dollar description of the asset. All of this is simply a sophisticated effort at "lets pretend" or "modeling", in modern jargon, and all of it involves judgment.

Id. at 554. The court also noted that "from all the evidence presented it is clear that there is more than one way to value a railroad. . . . All the methods may be equally rational given their underlying assumptions. And they are all irrational if pressed to extremes." *Id.* at 555. The court therefore concluded that the railroads could not establish that their proposed methodology of valuation was, in some absolute sense, "truer" than any other. The railroads here correctly note that the across-the-fence method of valuation used in Virginia is not employed for any property other than railroad property. They argue that the Virginia method is therefore facially inequitable since it treats railroad property like no other property in the state. Their solution—the unit method—is no better however, since no other property in the state is taxed by the unit method either. The point is that railroad property is unlike all other property in the state. Consequently, the valuation method for railroad property will necessarily differ from the methods used for other property in the state. And once one concedes that the valua-

tion of railroad property requires a different method than that used for all other property, the choice of what alternative method to use is one of pure policy, unguided by any judicially determinable notion of "correctness" or "truth".

III

We conclude that § 306 does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property. The statute simply does not authorize the judiciary to enter into the difficult task of second-guessing a state's policy assessment of how best to value property. In light of Congress' expressed preference against federal interference in state taxation policy, we believe that § 306 should be read narrowly, authorizing challenges to a state's calculation of fair market value, but not to a state's method for calculating such value. If Congress determines that one valuation methodology produces more accurate values than another, it may require states to utilize that accounting method. Section 306, however, does not authorize the courts to perform that task.

In § 306, Congress has insured that railroad and nonrailroad property will be treated similarly under whatever valuation methods have been selected by a given state. If the Congress further desires to standardize the valuation side of the taxation process, it could set out the methodologies it thinks are fairest to railroads. The courts, however, cannot make that judgment without completely displacing the fact-finding and policymaking powers of state government. The 4-R Act does not authorize the judiciary to undertake the difficult, and arguably impossible, task of determining which specific assessment methodology produces true market value of railroad property. Consequently, we affirm the order of the district court granting summary judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Oct. 3, 1990]

This matter is before the Court on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56, and on the plaintiffs' motion for preliminary injunction, pursuant to Fed. R. Civ. Proc. 65(a). On the basis of the pleadings, supporting briefs, and arguments made at the September 20, 1990 hearing, the Court hereby SUSTAINS the motions for summary judgment and partial summary judgment and DENIES the motion for preliminary injunction for the following reasons.

Factual History

This case constitutes the most recent episode of a ninety year debate between the state of Virginia and the railroads about the proper method of transportation property taxation. Throughout the course of this debate, the state and the railroads have alternately supported and opposed the legitimacy of the "unit method" of taxation, which calculates property value based upon capitalization of business operating income.

In 1983, the General Assembly transferred the responsibility for assessing railroad property in Virginia from the State Corporation Commission to the Department of Taxation. The Department adopted the unit method of assessing railroad property in Virginia beginning in tax year 1984. The Department's unit method caused the assessed value of railroad operating land to fall significantly in numerous localities in Virginia.

The County of Arlington and the City of Alexandria subsequently challenged the Department's decision to adopt the unit method. In ruling on that challenge, the Virginia Supreme Court affirmed that the unit method is improper in Virginia since it does not measure fair market value in accordance with the Virginia constitution. *County Board of Arlington et al. v. Department of Taxation*, 240 Va. 108, 393 S.E.2d 194 (1990).

As a result of the Court's determination, the Department of Taxation has indicated it intends to return to an assessment based on fair market value. Land will be assessed by comparing railroad parcels with the assessed values of other local properties. The proposed method includes equalization of railroad property assessments with other property assessments to prevent discrimination. In August, 1990, the plaintiff railroads brought an action in this Court seeking to enjoin the state from assessing rail transportation property for ad valorem taxation, for the 1990 tax year and from publishing such assessments for the use of counties and cities in Virginia in levying taxes. According to the railroads, the proposed method of taxation discriminates against the railroads in violation of 49 U.S.C. § 11503. The local intervenors, consisting of Alexandria, Arlington, Fairfax County, Prince William and Hanover, moved for summary judgment on September 13, 1990. The defendants adopted parts one and two of the local intervenors' motion for summary judgment. They excluded the equalization claim from their motion for partial summary judgment because they

were, at the time, negotiating with the railroads in an effort to resolve the equalization issue.

Analysis

The plaintiff railroads mistakenly characterize the issue presented by the dispute between the parties as one of federal preemption. The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503, prohibits discriminatory taxation of railway property. The language and legislative history of the Act make clear that it does not impose a particular method of taxation on the state but rather requires the state to treat different entities within its boundaries similarly for purposes of taxation.

In *County Board of Arlington, et al. v. Dept. of Taxation*, 240 Va. 108, 393 S.E. 2d 194 (1990), the Virginia Supreme Court held that the "unit method" of taxation violated the state constitution and code because it provided a business or use valuation that did not measure the fair market value of personal property or real property required by Virginia law. The plaintiff claims that the Department of Taxation's consequent shift from the unit method to a fair market value assessment scheme will result in discrimination against railroad property. However, the sole basis for the Plaintiff's claim is the opinion of a Department of Taxation representative that abandonment of the unit method will result in the assessment of transportation property at a value which bears a higher ratio to the true market value of such property than the ratio which the assessed value of all other commercial property in the same assessment jurisdiction bears to the same market value of such commercial and industrial property. Expert opinions are not sufficiently conclusive to create a factual issue. Absent factual evidence of discrimination, the plaintiff can not successfully oppose the defendant's motion for summary judgment on the basis of genuine issues of material fact.

Summary judgment is hereby entered in favor of the defendant and the local intervenors.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

3 Oct. 1990
Date

/s/ Richard L. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

ORDER

This matter is before the Court on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56. For reasons stated in the accompanying memorandum opinion, the motions for summary are SUSTAINED and the plaintiff's subsequent motion for injunction pending appeal is DENIED. The parties are hereby authorized to file whatever depositions they consider necessary to complete the record.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

Oct. 3, 1990
Date

/s/ Richard L. Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

C.A. No. 3:90CV00484

CHESAPEAKE WESTERN RAILWAY *et al.*,
Plaintiffs,

v.

WILLIAM H. FORST, *et al.*,
Defendants.

FINAL ORDER

This matter is before the Court on the plaintiffs' motion for preliminary injunction, pursuant to Fed. R. Civ Proc. 65(a), and on the local intervenors' motion for summary judgment and the defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. Proc. 56. For reasons stated in the accompanying memorandum opinion, the motions for summary judgment are SUSTAINED and the motion for preliminary injunction is DENIED. The parties are hereby authorized to file whatever depositions they consider necessary to complete the record.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

3 Oct. 1990
Date

/s/ Richard L. Williams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 24, 1991

No. 90-2920

CHESAPEAKE WESTERN RAILWAY; CSX TRANSPORTATION, INCORPORATED; INTERSTATE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY; SOUTHERN RAILWAY COMPANY,

Plaintiffs-Appellants

v.

WILLIAM H. FORST, Tax Commissioner, Virginia Department of Taxation, His Successors in Office; DAVID E. JORDAN, Assistant Director, Property Tax Division, Virginia Department of Taxation, His Successors in Office; CITY OF ALEXANDRIA; COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA; COUNTY OF FAIRFAX; COUNTY OF PRINCE WILLIAM, VIRGINIA; COUNTY OF HANOVER, VIRGINIA,

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc along with a motion for leave to file addendum to the petition. No member of the Court

requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc and the motion for leave to file addendum.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Phillips and Judge Hamilton.

For the Court,

/s/ John M. Greacen
Clerk

STATUTE INVOLVED

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the Untied States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:90 CV 00484

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Plaintiffs,

vs.

WILLIAM H. FORST, ETC., *et al.*,
State Defendants,

THE CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Local Defendants.

September 14, 1990
Richmond, Virginia

The deposition of DAVID E. JORDAN, taken at the instance of the plaintiffs, before Carol Hill, a Notary Public for the State of Virginia at Large, beginning at 11:30 a.m., at the offices of CSX Corporation, James Center, 901 East Cary Street, Richmond, Virginia; said deposition taken pursuant to the Federal Rules of Civil Procedure.

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[4] DAVID E. JORDAN, a witness, called by the plaintiffs, first being duly sworn, testified as follows:

EXAMINATION BY MR. GIBSON:

Q Tell us your name and home address, please.

A David E. Jordan, 9002 Splitwood Circle, Richmond, Virginia 23229.

Q Mr. Jordan, you're employed by the Virginia Department of Taxation?

A Yes.

Q What is your present position?

A Assistant director of the Property Tax Division.

Q When did you take over that title?

A I think it was in April 1989.

Q What was your position with the department immediately preceding that?

A Railroad and pipeline appraisal manager.

Q The position now occupied by Mr. Mawyer?

A Essentially the same position, yes.

Q Are you still involved in the appraisal of railroad and pipeline property notwithstanding your promotion?

A I'm involved with it but to a lesser degree than I once was.

* * * *

[11] Q Were you aware of valuation issues by the time you and the Commissioner and Mr. Forberg began discussing it? Obviously, you were.

A Yes.

Q What were the issues that you saw at that time?

A Well, I think the first thing that struck me was the inconsistency, or what I regarded at the time as an inconsistency, let me say, between the application of a land value to the railroad right-of-way that was derived by looking at an alternative use for the railroad and then the compounding of that by placing a value upon the [track] as though both uses could exist simultaneously.

[12] Q The land use being used for one purpose and the [track] devoted for an entirely different purpose?

A That's correct.

Q Is there a doctrine or an appraisal principle known as the consistent use doctrine?

A Yes.

Q Would you define that for us?

A Consistent use principles would say that you must be consistent between the use of the land and your assumptions as to the use of the land, and the use of the improvements on the property.

Q Which valuing for one purpose as commercial property and valuing for another purpose as railroad [track] would violate, in your opinion?

[Colloquy regarding objection omitted]

[13] A I think, to answer your question or to begin to answer it, we're getting close to an area where the distinction between the unit method and the inventory and summation method becomes more evident.

I'm advised that I need to answer your questions. I wanted to state that the law in Virginia has been decided by the Virginia Supreme Court, and as an employee of the Department of Taxation, I'm obliged to defend those assessments that are being made pursuant to that ruling as best I can, and that my personal views on the matter are well-known and well-documented and irrelevant to this proceeding.

Q Now, having stated that, would you answer my question? I appreciate the spot you're in. I understand it.

A It is a violation of the principle of consistent use.

Q That first issue, as you recall, cropping up in your mind, the inconsistency, relates primarily to the across-the-fence value for land; is that right?

[14] A Yes.

Q Did you find other problems, valuation issue problems, in the SCC methodology as applied to railroad valuation besides just across-the-fence value?

A Yes. In the land value, itself, the parcelization of the railroad right-of-way led to some conclusions that just intuitively did not make sense.

Q Tell me with more precision exactly what you mean by that.

A Well, the across-the-fence methodology would say that if you had railroad parcel A and railroad parcel B and adjoining that you had non-railroad parcel C and non-railroad parcel D, that railroad parcel A must equal in value to non-railroad parcel C, and that railroad parcel B must equal in value to non-railroad parcel D.

Q Because they're contiguous to one another?

A Because they are contiguous. And C and D aren't necessarily the same. One could be a junkyard, and the other could be a hotel, high-rise hotel, and so we end up in a situation where the only two parcels that are alike in this whole situation are the railroad parcels A and B, and we have a methodology which says that they cannot be the same value.

Q In this parcelization process that is required under the across-the-fence value, do you really have railroad parcels A and B in reality?

[15] A In my opinion, no.

Q Let's take the Richmond, Fredericksburg & Potomac Railroad as an example. You're familiar, of course, with that railroad?

A More than I would like to be.

Q What, in your appraisal judgment, is the parcel of land, that is, the parcel to be evaluated for fair market value purpose?

[Colloquy regarding objection omitted]

A It's one parcel.

Q From where to where?

A From the south end of Long Bridge to the middle of the James River.

Q Long Bridge is over the Potomac?

A That's correct.

* * * *

[24] Q After confronting these issues, discussing them with Mr. Forberg and Commisisoner Forst, what conclusion did you reach as to how railroads should be valued for ad valorem tax purposes at fair market value?

[25] A My conclusion was the unit method was the only appropriate methodology which could be employed to value—to determine the fair market value of a railroad.

Q You accordingly did appraisal work under the unit method until the Supreme Court decision in June of this year?

A Yes.

* * * *

[33] Q Is there a recognized term in the appraisal field as special use property?

A Yes.

Q How would you define special use property?

A Well, special use or special purpose property is generally property which is adopted or designed for one particular purpose and cannot be made readily available for another purpose.

Q What about railroad property, is it special use property?

[34] A I think most appraisers consider railroad property to be special purpose property.

Q In general, Mr. Jordan, what is considered the highest and best use of special use property for the purpose of determining fair market value—

[Objection omitted]

Q —in your personal view?

A Generally, it's continued use and the present use.

Q Did you make a highest-and-best-use determination of the property of the six railroads that are involved in

this litigation for tax years 1984 through 1990, up to June 8, 1990?

A Well, some of those periods would have been done by Mr. Mawyer, but a determination was made.

Q What elements did you look at, under your supervision, did Mr. Mawyer consider to determine the highest and best use of railroad property in appraising that property in Virginia, railroad operating property?

A The same elements that we talked about before are always the things that have to be considered.

Q Well, you said one, I believe, was legal permissibility?

A Yes.

[35] Q How does that particular element relate to railroad operating property?

A Well, the Interstate Commerce Commission—

[Colloquy regarding objection omitted]

A My understanding as an appraiser is that the Interstate Commerce Commission has the ability to require railroads to connect and to interchange cars, and, that is, once something is part of an international rail system, it cannot simply get out of the rail business. That argues in favor of continued use as railroad property.

Q Are there economic considerations which argue in favor of continued use as railroad property, economic feasibility considerations?

A Well, certainly, if you look at the entire railroad, there's nothing else that really looks like a railroad. It's hard to—It's difficult to envision a use made of the mass of the property which would be something which would be economically feasible which would be something other than a railroad.

[36] Q Physical possibility, is that another element that bears on the determination of highest and best use of railroad property, railroad operating property?

A Yes, I think it does, to a certain extent, because if you could identify—you could identify a part of a rail-

road that could possibly be economically feasible to do something else with, but you can't sever the railroad in the middle of the railroad track and leave a gap in the system.

So, basically, with the exception of some yard properties that can be differentiated, then the system has to remain intact.

So you have a problem with physical—I guess that goes to the issue of economic feasibility as well as physical possibility.

Q One other consideration I want to ask you about. What about the reasonable probability of an alternative use, is that a consideration which you took into account in determining highest and best use for the railroad operating property?

A Well, since we have had a national rail system for many, many years, we have a federal agency, part of which its responsibility is to ensure the continuation of that.

There has been a great deal of legislation in a great many years with the Four-R Act and [Staggers] Rail Act that—all of which would lead a reasonable person to [37] conclude that the railroads have been there a long time and they are going to continue to be here a long time.

So if a railroad is—if a particular railroad is not just absolutely losing money like pouring water out of a boot, then the chances are it's going to continue to be a railroad.

Q Mr. Jordan, are there any unique characteristics of the railroad operating property which would lend unit method appraisal techniques appropriate for railroad property where you might not use it for other types of businesses, like maybe IBM or General Motors or something like that?

A Sure.

Q Tell us what those unique characteristics are.

A Well, the property that IBM owns is severable from IBM.

Q They can shut down plants?

A That's right. They do, I assume. I know other corporations, such as Dupont or Allied Chemical, companies that have presences (sic) here in Virginia, open up, shut down, move out very frequently parts of their corporation.

It's difficult to do with a railroad because of the interdependence of the various parts of the system.

* * * *

[39] Q If you carry out the assessment that the department intends to carry out for 1990 for these plaintiff railroads, in your opinion, will the assessment of these railroads transportation property bear a higher ratio to the true market value of these railroad transportation property than the ratio which the assessed value of all other commercial and industrial property in Virginia bears to the true market value of such other commercial and industrial property?

MS. ROSE: Objection.

MR. McCANDLISH: Are you defining fair market value under Virginia law?

MR. GIBSON: No, fair market value under appraisal theory.

MR. McCANDLISH: Wholly apart from Virginia law and on the basis of his personal opinion?

MR. GIBSON: That is correct.

A On the conditions stated by Mr. McCandlish, the inventory and summation assessments will be in excess of what, in my personal opinion, would be the market value of those rail systems.

Q In your personal opinion, what you know from ratio [40] study evidence and other evidence from the department's records, will commercial and industrial property other than railroad property likely be assessed for no more than fair market value for 1990?

A That's correct.

Q And will the differential, in your personal opinion, between the assessment level of commercial and industrial property other than railroad property be exceeded by the assessment level of railroad property by more than 5 percent?

A Most probably

MR. GIBSON: I have no further questions.

MS. ROSE: I have no questions.

* * * *

Supreme Court, U.S.
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No. 91-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE CITY OF ALEXANDRIA, VIRGINIA, THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, THE COUNTY OF FAIRFAX, VIRGINIA, THE COUNTY OF PRINCE WILLIAM, VIRGINIA, AND THE COUNTY OF HANOVER, VIRGINIA

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QUESTIONS PRESENTED

1. Whether the Railroad Revitalization and Regulatory Reform Act prohibits a state from valuing and taxing real estate owned by a railroad in the same way that it values and taxes all other commercial and industrial real estate.

2. Whether the Act authorizes a federal court to require a state to conform to a single economic theory of value for rail property based on the court's weighing of the expert testimony in a given case.

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BRIEF IN OPPOSITION FOR RESPONDENTS THE CITY OF ALEXANDRIA, VIRGINIA, THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, THE COUNTY OF FAIRFAX, VIRGINIA, THE COUNTY OF PRINCE WILLIAM, VIRGINIA, AND THE COUNTY OF HANOVER, VIRGINIA

STATEMENT

The Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), 49 U.S.C. § 11503, prohibits discrimination in state and local property taxation by requiring, *inter alia*, that the ratio between the assessed value and the market value of rail property not exceed by more than five percent the same ratio for "other commercial and industrial property." *Id.* § 11503(c). Petitioners in this case claim that the courts must calculate the "market value" of all rail property for the purpose

of applying this formula by using a "unit" methodology —a process that begins by valuing an entire railroad as an ongoing business and then seeks to attribute some portion of that overall value to each piece of the railroad's property. Virginia uses a different approach, calculating the market value of real estate—whether owned by a railroad or by any other commercial or industrial land owner—not based on the particular use to which the parcel of land is now devoted but based on the best *potential* use and the resulting potential sales value of the property in the local market. According to petitioners, the Virginia approach, when contrasted to the unit method, overvalues their land by more than 5% and, therefore, Virginia violates the 4-R Act. The courts below rejected this claim, recognizing that statewide valuations of railroad property necessarily depend on the application of some economic theory of value and that, contrary to petitioners' submission, Congress did not intend to impose a single such theory on all states or to have the courts choose such a theory on the basis of the expert testimony in each individual case.

1. *Virginia's Method of Valuing Real Property.*—In Virginia, all real property is assessed for purposes of local property taxation based on its actual "fair market value" in the city or county where it is physically located. Va. Const. art. X, §§ 2, 4. This "fair market value," in turn, reflects "all the uses to which [the property] may be applied or for which it is adapted," not just its current use. *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 300, 124 S.E.2d 206, 210 (1962) (internal quotes omitted); *see County Bd. v. Commonwealth*, 240 Va. 108, 112, 393 S.E.2d 194, 196 (1990). The assessment of railroad land for local property taxation is done at the state level, using a system known as the "across-the-fence method." Under that method, the value of rail land is set by comparing it to comparable non-rail commercial and industrial property that has been valued at

its highest and best use. *See Richmond, F. & P. R.R. v. State Corp. Comm'n*, 219 Va. 301, 305-06, 247 S.E.2d 408, 410-11 (1978). Any property owner dissatisfied with his assessed value may seek administrative and, ultimately, judicial review. Va. Code Ann. § 58.1-2670 (Michie 1991) (state assessments); *id.* § 58.1-3984 (Michie 1991) (local assessments).

Virginia has followed this approach to taxing rail lands since the beginning of this century.[1] In 1983, however, the state transferred responsibility for assessing rail property from its Corporation Commission to its Department of Taxation ("DOT"), which chose to use a unit method for calculating such property values. Under that method, the land is given a value tied to its existing use (as a railroad) and calculated indirectly, by subtraction of non-realty values from overall business value. Specifically, the unit method first establishes a value for an entire interstate railroad as a going concern (based, for example, on stock values or projected earnings); it then assigns values to the non-real estate assets, and the residual number is deemed to be the value for the total of the railroad's real estate. That figure is then pro-rated based on the percentage of the railroad's track mileage within a given state and ultimately within each relevant taxing jurisdiction. *See, e.g., Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 547 (D. Utah 1988).[2]

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[1] At that time, the railroads in Virginia successfully *opposed* a proposal to value rail property using the "unit method"—presumably because their profitability back then made such a system less favorable to them. *See Norfolk & W. Ry. v. Commonwealth*, 211 Va. 692, 699, 179 S.E.2d 623, 629 (1971).

[2] For example, if the value of a railroad's total real estate (calculated under the unit method) is $50 million and 10% of that property is located in Virginia, the Commonwealth could assess taxes on $5 million; further, if Virginia's ten percent is divided such that five percent is located in major urban areas and five percent is located in isolated rural areas, the railroad's real estate value would be identical in both situations.

As a result of the DOT's change to the unit method, certain local taxing jurisdictions in Virginia—those with high-value commercial and industrial real estate—witnessed a large decrease in the assessed value of railroad property. Two of those jurisdictions, respondents City of Alexandria and Arlington County, which contain large amounts of railroad property,[3] brought suit in state court, claiming that the DOT's use of the unit method violated the Virginia Constitution's requirement that property tax assessments reflect "fair market value." Va. Const. art. X, § 2.[4]

The Virginia Supreme Court upheld this claim, concluding that the unit method does not impose a tax on the value of real estate *qua* real estate, but instead looks only to a particular use and then calculates the value of that current use based on factors "unrelated to the land and its improvements," such as the efficiency of the railroad as a business or the skills of its managers. *County Bd. v. Commonwealth*, 240 Va. at 113, 393 S.E.2d at 197. Under this system, the court observed, the real estate owned by an unprofitable railroad would actually have a "negative value," a result that the court considered to be absurd. *Ibid.* In response to this ruling, the DOT adopted the "across-the-fence" methodology that had previously been applied to determine the "fair market value" of railroad property in Virginia.

2. *The Proceedings in This Case.*—Immediately after the Virginia Supreme Court's decision, the petitioner railroads filed the present action.[5] They claimed that the

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[3] This property includes several hundred acres in the "Potomac Yards," just west and south of National Airport.

[4] One of the petitioners in the present case, the Richmond, Fredericksburg and Potomac Railroad, participated in the state court case and supported the DOT's use of the unit method.

[5] The original defendants were the DOT officials responsible for assessing rail property in Virginia. Respondents City of Alexandria,

"true market value" of their property—as that term is used in the 4-R Act formula—can only be calculated by using the unit method of valuation, and that Virginia's system produced market values (and thus assessments) well above this measure of "true" value. Pet. App. 11a-12a. For all other industrial and commercial real estate, petitioners *accepted* Virginia's traditional valuation approach (based on the local market value of the land reflecting its highest and best use rather than its current business use), and noted that the assessments for that property concededly did not exceed market value. Thus, relying on two different concepts of value on the two sides of the statutory equation, petitioners submitted that the ratio between the assessed and market values for their property impermissibly exceeded the ratio for other commercial and industrial property in the state.

The district court granted summary judgment for the defendants, concluding that "[t]he language and legislative history of the [4-R] Act make clear that it does not impose a particular method of taxation on the state." *Id.* 13a. The court further ruled that petitioners had not shown a relevant factual dispute by pointing to the deposition testimony of a DOT official to the effect that, in his view, the unit method produced the "true" estimate of the value of rail property. *Ibid.*

The Fourth Circuit affirmed, likewise holding that the 4-R Act "does not provide a basis for parties to challenge a state's preferred accounting method" for establishing the "true market value" of a railroad's real estate. *Id.* 5a. Finding the statutory language to be ambiguous on this question, the court turned first to the legislative history, which it read as indicating that "Congress did not intend for courts to displace the state's policy choice

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Arlington County, Fairfax County, Prince William County, and Hanover County were permitted to intervene as defendants because they have the most concrete interest in defending the use of the "across-the-fence" method.

about what constitutes the best method for determining true market value of railroad land." *Id.* 6a. To support that view, the Fourth Circuit relied heavily on *Union Pacific*, *supra*, a Utah case in which the district court, after hearing six weeks of lay and expert testimony, found that it was unable to ascertain which of several potential methodologies correctly establishes the "true market value" of rail property, because the selection of a methodology necessarily rests on theories and assumptions that are not demonstrably true or false. 716 F. Supp. at 553-54. Recognizing that petitioners' contrary view of the 4-R Act would require the courts to select a "singularly correct" methodology, the court of appeals concluded that Congress did not intend for the courts to make such a "pure policy [decision], unguided by any judicially determinable notion of 'correctness' or 'truth.' " Pet. App. 10a.[6]

REASONS FOR DENYING THE PETITION

This case does not warrant review for two reasons. First, the Fourth Circuit's ruling—that the 4-R Act does not authorize judicial imposition of a single *methodology* for calculating the market value of a railroad's real estate—is correct. Second, the case satisfies none of the traditional criteria for certiorari: during the 15 years of the 4-R Act's existence, there has been almost no litigation concerning this issue and thus, not surprisingly, no conflict has arisen in the circuits.

1. Petitioners' position is that Congress's use of the term "true market value of . . . rail transportation prop-

[6] The Fourth Circuit also noted that Congress has generally disfavored "federal interference in state taxation decisions." Pet. App. 6a. While acknowledging that the 4-R Act was "an express exception to th[is] policy," the court declined "to disregard this general policy in areas where [the 4-R Act] does not plainly authorize such an exception and where the federal courts are ill equipped to evaluate the merits of a challenge to a state taxation scheme." *Ibid.* (citations omitted).

erty" in the 4-R Act's comparison formula means, as a matter of plain language, that courts must independently determine the best method to measure this value in every case. The court of appeals properly rejected that argument, because it recognized that to the extent that a railroad challenges a state's *method* of valuation, the question of "true market value" is not one of fact but reflects instead a "pure policy" choice, Pet. App. 10a, which Congress did not intend to remove from the states. The persuasiveness of this fundamental point is demonstrated by the two key (although unstated) premises of petitioners' claim here: (1) that the 4-R Act was intended to displace a state's decision about the nature of the "value" it wishes to tax, *even where railroad property is treated the same as all other property;* and (2) that Congress preferred these ultimately arbitrary policy choices to be made by the courts, with no legislative guidance. Nothing in the language, legislative history, purpose, or structure of the 4-R Act supports this radical construction.

a. Petitioners' first essential premise—that Congress's use of the words "true market value" of rail property in section 11503(b)(1)[7] must be read to require utilization of a special valuation method, applicable solely to railroads, based on the assumption that rail land can *only* be used as rail land—is incorrect for several reasons. To begin with, the statutory language simply does

[7] This section provides in full:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> > (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

not support such a reading. The statute refers only to "the true market value of the rail transportation property"; it does not include the words that petitioners would read into it: "*as that property is currently being used.*" Absent those limiting words, certainly the most natural reading of the term "market value" is what the land could secure in the market for its best and highest (and not necessarily its current) use. Indeed, the unit method has been described as not truly using a standard for *real estate* value at all. *See ITT World Communications v. San Francisco*, 37 Cal. 3d 859, 865, 693 P.2d 811, 816, 210 Cal. Rptr. 226, 231 (1985) (the unit method of taxation is "simply *not* real property taxation either in substance or in form") (emphasis added). Thus, petitioners' reading of the statute is actually at odds with its plain meaning.

To read petitioners' preferred words into the statute, moreover, would be directly contrary to the purpose of the 4-R Act, converting it from a shield *against* discriminatory treatment into a mandate *for* discriminatory treatment. Thus, for example, Virginia values *all* real estate not by its *current* use, but by its highest and best use. *See* p. 2, *supra*. And petitioners' entire claim rests on the premise that the Virginia method yields the correct measure of value for all *non*-rail commercial and industrial property (since they use the existing assessments and estimates of the market value of this property as their benchmark for comparison). Yet petitioners read the 4-R Act as mandating, at least in this case, adoption of a different standard of value, using a different methodology, only for railroads. That view would turn the 4-R Act upside down.

Petitioners' suggestion that section 11503(b)(1) requires their railroad land to be valued on the basis of its current use is also at odds with the actual experience in Virginia. Thus, for example, petitioner Richmond, Fredericksburg and Potomac R.R. Co. has in fact sold off a considerable amount of land in the Potomac Yards, re-

ceiving prices that reflected its value for commercial development and that far exceeded the value estimated under the unit method.[8] Petitioners offer not the slightest reason for suspecting that Congress would have wanted to allow railroads to insist that a state disregard these kinds of real-world possibilities when it adopts a measure of value for real estate owned by railroads.

b. Petitioners' second premise—that Congress not only wanted to prevent the states from applying their own methodologies for valuing rail property but also wanted the judiciary to select such a methodology based on the expert testimony in a particular case—further shows that petitioners' reading of the 4-R Act is incorrect. Petitioners recognize, as they must, that, for a railroad to be valued consistently throughout any taxing jurisdiction, *some* form of methodology not based on actual rail property sales must be used, because railroad property is not widely sold. Indeed, petitioners' entire claim is based *not* on a comparison of the assessed and actual market values of railroad land that has, in fact, been sold in Virginia, but rather on the allegation that their proposed unit methodology yields a better theoretical estimate of the true market value than does Virginia's across-the-fence approach.[9]

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[8] *See* Pls. Exh. 18 in *County Board, supra* (reflecting sales for prices that often reached more than $1 million per acre). *See also County Board*, 240 Va. at 111, 393 S.E.2d at 195-96 (change to unit method in 1984 dropped assessment of 420 acres in Potomac Yards from $80,820,700 to less than $20 million).

[9] The need for selecting some form of non-sales methodology for valuing rail property under the 4-R Act not only is acknowledged by petitioners, but also is strongly supported by the statutory language. Thus, the 4-R Act expressly states how the courts are to determine one of the two sets of variables—*i.e.*, the ratio between "assessed value" and "true market value" for "other [non-rail] commercial and industrial property." Specifically, section 11503(c)(1) requires application of a "sales assessment ratio study," 49 U.S.C. § 11503(c), which compares the sale prices of a sample of recently sold properties with their assessed values. *See Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461-62 (1987); S. Rep. No. 1483, 90th

But once it is acknowledged that the true market value of rail property must be derived methodologically, it quickly follows that the 4-R Act does not countenance challenges to each state's selection of a particular methodology from a variety of available options. That is true because, for the 4-R Act's formula to be capable of application, a single methodology of valuation is essential: otherwise, the mathematical comparison would be meaningless. One way to make the comparison possible is to respect the state's choice. The only other way would be to find in the statute itself a single methodology. But it is a patently implausible view of congressional intent to suggest that the 4-R Act contemplates a single methodology.

First, notwithstanding Congress's expressed awareness of several different valuation standards, *see* p. 12 *infra*, it did not specify a method for assigning value in the statute. Second, Congress could not have contemplated that the courts would select a method on the basis of competing expert testimony about which economic theory most accurately estimates "true market value" for rail property. That is simply an impossible task for courts: as the district court in *Union Pacific* concluded after listening to six weeks of expert testimony regarding valuation methodologies, a court "cannot say that any one method is necessarily more rational than any other." 716 F. Supp. at 555. The Court explained:

> Absent evidence of an actual sale, the term "true market value" is at best a rational fiction. Conclu-

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Cong., 2d Sess. 23-24 (1968). This calculation is possible, of course, only because for non-rail property there is an ongoing market that produces actual sales prices. By contrast, the 4-R Act provides *no* method for calculating the other half of the equation—the ratio of assessed to market value for rail property. While this omission does not indicate that the value of "[rail] property may not be proved at all," *Oklahoma Tax Comm'n*, 481 U.S. at 463 (footnote omitted), it does buttress the conclusion that valuation methodologies are not subject to attack—as footnote 5 of the *Oklahoma Tax Comm'n* opinion, which is the footnote omitted from the quote above, intimates.

> sions as to true market value are based on each appraiser's best judgment, and each appraiser approaches the task of valuation a little differently, with his own assumptions and theories as to what mythical buyers and sellers consider (or should consider) in arriving at an agreed-on price.

Id. at 554.[10] Not only would the process of selecting a "best" methodology be nightmarish as a practical matter —requiring lengthy trials based on a battle of experts, which will almost certainly lead different courts to reach different conclusions and thus require this Court, in order to ensure national uniformity, to impose a single methodology—but the very goal of a judicially determinable answer is illusory. Any choice, as the Fourth Circuit properly observed, would in the end be "one of pure policy, unguided by any judicially determinable notion of 'correctness' or 'truth.'" Pet. App. 10a.

Finally, we note that the 4-R Act further provides that "[t]he burden of proof in determining . . . true market value is governed by State law." 49 U.S.C. § 11503(c). That, of course, means that the plaintiff railroad—certainly in Virginia, and probably in all jurisdictions—will have the burden of proving that the state's determination of market value for its real estate is incorrect. But, as a logical matter, that burden can never be satisfied where the railroad's challenge is to a choice of methodology like Virginia's: because the issue involves a policy decision and not a question of fact, a court cannot find that the railroad has met its burden of proving the methodology incorrect.

c. The legislative history of the 4-R Act also confirms that Congress did not intend the federal courts to pick

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[10] The court reached these conclusions in a case limited only to different unit methodologies. A court's task obviously would become even more confounding in a case like this one, where a state uses an across-the-fence measure of land value, which will then have to be tested against one or more unit methodologies in order for the statutory calculation to be made.

and choose among competing valuation theories for rail property. At the time the 4-R Act was adopted, ten states used a valuation approach like Virginia's and 36 others used one or more of three different forms of the unit method: (1) business income capitalization, (2) market value of stock and debt, and (3) either original or reproduction cost less depreciation. *See* J. Runke & A. Finder, *State Taxation of Railroads and Tax Relief Programs* 27 (R. Marcelli, ed. 1977). Although Congress was aware of these varying approaches, there is not the slightest suggestion in the legislative history that it intended to have them replaced by a single methodology that the courts would ultimately conclude is better at estimating "true market value." On the contrary, in the Senate Report to one of the 4-R Act's precursor bills, a description of the divergence between "unit method" states and states "in which railroad property is locally assessed" was followed by a flat statement that the statutory formula does *not* impose "a standard for determining value; it is a standard to which *values that have already been determined* must be compared." S. Rep. No. 1483, 90th Cong., 2d Sess. app. B (1968) (emphasis added). *See also Burlington N. R.R. v. Lennen*, 573 F. Supp. 1155, 1163-64 (D. Kan. 1982) (reviewing legislative history), *aff'd*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984).

d. Petitioners offer three reasons to support their contrary reading of the 4-R Act. None of them has any persuasive force. To begin with, petitioners suggest that "immunizing discriminatory state tax methodologies from challenge would defeat the [4-R Act]," Pet. 13, because it would permit "wholesale discrimination through the adoption of result-oriented valuation methodologies," *id.* 16. We note initially that this argument is entirely hypothetical: petitioners have not pointed to a single state that has adopted a "result-oriented" valuation method designed to treat railroads unfairly. More fundamentally, however, a valuation "methodology" that "yields obvious

and substantial discrimination against railroads," *id.* 3, would *not* escape scrutiny under the 4-R Act. Such a discriminatory system, by definition, would have to single out railroad property for special treatment and would have to arrive at a market value in a way that is indefensible. Thus, for example, a state might assign a "true market value" to railroad property (but to no other property) that is three times the highest price received for any nearby property sold in the past year. But such a system would clearly violate the general prohibition of discriminatory taxation in section 11503 (b)(4) of the 4-R Act precisely because it arbitrarily and irrationally *singles out* railroads.[11]

Petitioners' final two arguments—(1) that the decision below is contrary to the reasoning in this Court's decision in *Oklahoma Tax Comm'n*, and (2) that the distinction between valuation *methodologies* and the *application* of such methodologies is meaningless—have largely been answered by *Oklahoma Tax Comm'n* itself. Thus, while the Court in that case did not resolve the question whether a state's valuation methodology may be disputed under the 4-R Act, it nevertheless noted a distinction between a challenge to "the valuation methodology employed by [a state]" and "the application of that methodology." 481 U.S. at 463 n.5. This statement hardly suggests that the Court considered its analysis to be inconsistent with such a distinction or that such a distinction would be meaningless.

As it turns out, moreover, the distinction is both sensible and workable. Selection of methodology, as we have explained, is not a judicially manageable or appropriate task. By contrast, there is no reason to think that a court would be unable to determine whether a state's chosen

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[11] For the same reason, even if petitioners' hypothetical of a blatantly discriminatory valuation "methodology" did escape 4-R Act scrutiny, there would be no need for concern since the equal protection clause of the Fourteenth Amendment would surely fill such a regulatory gap. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S. Ct. 633, 638 (1989).

methodology is being fairly and consistently applied. For example, under Virginia's across-the-fence method, if the state refuses to adjust railroad property values by taking into account the *same* factors as it does for other property—e.g., its shape, location, proximity to public transportation, etc.—then the state, *by its standard*, is not properly estimating the true market value of rail property. These, and related issues of application, are precisely the kinds of questions the courts normally decide in 4-R Act cases alleging tax discrimination against railroads. *See, e.g.*, Pet. 4 n.2; *id.* 6 n.4 (citing numerous cases). Indeed, despite petitioners' position here, one of them is currently challenging the *application* of Virginia's methodology to its property, arguing that its case is distinguishable from the Fourth Circuit's decision in this case. *See CSX Transp., Inc. v. Forst*, 777 F. Supp. 435 (E.D. Va. 1991).[12]

2. This case also does not merit review because it involves no issue of special importance or recurring concern, and there is no conflict among the circuits. To begin with, claims like petitioners'—challenging a state's choice of valuation methods—have rarely even been raised. Indeed, petitioners cite fewer than a handful of cases that present the issue. *See* Pet. 21-23. And, in the highly unlikely event that there is substance to petitioners' dire prediction—that the Fourth Circuit's decision will serve as "an open invitation for state tax officials to devise discriminatory methods for valuing railroad property" (*id.* 11)—there will be time enough for this Court to address *that* problem when it arises.

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[12] Petitioners cite *dicta* in a few cases stating that the distinction between methodology and application may not always be clearcut. Pet. 19-20. But those expressions appear to reflect little more than the customary confusion generated by unclear pleading, which can typically be clarified through pretrial motions. In any event, petitioners' suggestion that, in order to avoid the possibility of confusion at the margin, this Court should authorize the federal courts to subject each state's methodology to an abstract battle of the experts offers a cure that is much worse than the disease.

The paucity of litigation on this issue is further highlighted by the fact that no other court of appeals has even ruled on it, let alone disagreed with the decision in this case. Petitioners try to suggest otherwise, stating that the Fourth Circuit's position is "essentially opposed" to the views expressed by the Eighth Circuit in *Burlington N. R.R. v. James*, 911 F.2d 1297 (8th Cir. 1990). Pet. 21-23.[13] But their assertion is entirely unfounded. In *Burlington Northern*, the district court had held that the railroad was only challenging a state's valuation methodology and, relying on *Union Pacific*, *supra*, had dismissed the complaint as beyond its jurisdiction under the 4-R Act. *See* 911 F.2d at 1298, 1301. As petitioners concede (Pet. 22), the Eighth Circuit's reversal was premised on the fact that a "stipulation between the parties at least arguably framed the issue as one involving application of an accepted methodology" and thus presented a "colorable allegation" of unlawful discrimination. 911 F.2d at 1301. The court of appeals neither rejected the district court's reliance on *Union Pacific*'s distinction between challenges to a methodology and challenges to its application,[14] nor even intimated that the district court, on remand, should consider any challenges to the state's

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[13] Petitioners also state, in a footnote, that "[t]here is some indication that the Ninth Circuit . . . does not exclude methodology challenges from the scope of section 11503," (citing *Atchison, T. S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), *abstention order vacated*, 828 F.2d 9 (9th Cir. 1987)). Pet. 23 n.26. This "indication" supposedly derives from a reference to an unappealed portion of a district court decision that undertook a "thorough study" of the methodology utilized by a taxing jurisdiction. 795 F.2d at 1445 n.8. Obviously, petitioners stretch too far in suggesting that it is "significant" that the Ninth Circuit did not go out of its way to criticize this aspect of the district court proceedings. Pet. 23 n.26. Indeed, it appears that the defendants in the district court never even raised the question whether a challenge to their methodology was cognizable.

[14] The Eighth Circuit's only quarrel with *Union Pacific* was with respect to an issue not relevant here—the requirement that there be some showing of discriminatory intent. 911 F.2d at 1301.

methodology for valuing railroads.[15] There is thus no conflict in the circuits.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[15] The Eighth Circuit stated that the "district court obviously believed that, despite the parties' characterization of the issue, it would be required to weigh competing methodologies were it to determine the merits." 911 F.2d at 1301. The court of appeals acknowledged that this "belief may or may not prove to be true," *ibid.*, but simply held that there was no basis for assuming that the railroad was not pursuing a legitimate "application" claim on the record as it stood in the district court.

[16] Petitioners also suggest that there is expanding "disarray" among the district courts. Pet. 23. They cite, however, only *one* district court opinion that arguably takes a position different from that of the Fourth Circuit—*ACF Indus. v. California State Bd. of Equalization*, No. C-89-3449 (N.D. Cal. opinion filed Sept. 13, 1991). That decision evinces no awareness of the Fourth Circuit's earlier ruling in this case. This hardly constitutes a problem of "disarray" that needs to be addressed at this time.

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No. 91-1198

In The

Supreme Court of the United States

October Term, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,

Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court correctly entered summary judgment against Petitioners, who contended that a federal statute prohibiting state tax discrimination against railroads *requires* a state to use a particular method for determining the fair market value of railroad real property even if that method alters the object of a general state tax as it applies to railroads?

2. Whether this Court should decline plenary review in a case where issues of collateral estoppel and *Younger* abstention cloud the record and may preclude any further review in federal court below?

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No. 91-1198

In The

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CHESAPEAKE WESTERN RAILWAY, *et al.*,

Petitioners,

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TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The question framed by Petitioners is whether the federal Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (the "4-R Act"), authorizes a federal court challenge to a state's choice of methods for valuing railroad real property for local tax purposes. More specifically, Petitioners claim to be aggrieved by Virginia's assessment of railroad *real property*, because Virginia uses an "inventory and summation" method of valuing the property. This method, which requires that the fair market value of real property be determined according to its highest and best use in its particular

location, was retained at the behest of the railroads, and has been utilized in Virginia for more than ninety years.

In this case, under the guise of a 4-R Act challenge, Petitioners now seek a federal court order forcing the state to abandon its established inventory and summation method, requiring instead that Virginia adopt the "unit method" for property valuation. This method assigns railroad real property a "use value" based not upon the value of the land, but upon the railroad's net income. Respondents argued below and submit here that there is nothing in the language of the 4-R Act, or in any of this Court's prior decisions, that *requires* a state, as a matter of *federal* policy, to select one property valuation methodology over another, and that conclusion is the crux of the decisions below.

As the courts below recognized, it is clear that there is nothing inherently discriminatory about the inventory and summation method as a property valuation technique. There also was no evidence presented in the summary judgment record to suggest that Virginia adopted that methodology, or continued its use over time, in an effort to resist the Congressional directives embodied in the 4-R Act. Indeed, the question of how to value railroad property for property tax purposes has been frequently debated in the Virginia General Assembly. Railroad lobbyists have actively participated in the debate, and have successfully influenced the resulting legislation enacted by the Virginia legislature. For example, when Virginia considered adopting the "unit method" of valuing railroad property for local tax purposes during its 1901-1902 Constitutional Convention, the railroads' lobby opposed

the change and convinced the Convention delegates to retain instead the state's inventory and summation approach. *Norfolk & Western Ry. Co. v. Commonwealth*, 211 Va. 692, 699, 179 S.E.2d 623, 629 (1971). Virginia still was using that method when Congress passed the 4-R Act more than seventy years later. *Chesapeake Western Ry. v. Forst*, 938 F.2d 528, 529 (4th Cir. 1991).

Following the adoption of the 4-R Act by Congress, the 1978 Session of the Virginia General Assembly enacted S.B. 456, which was designed to bring Virginia into compliance with the 4-R Act in a timely fashion. This legislation repealed a gross receipts tax applicable only to railroads, and extended to railroads the state income and franchise taxes that other corporations operating in Virginia paid. Va. Dept. of Taxation, Research Division, *1978 Legislative Digest* 3-4 (May 1978). Significantly, no state or federal court has ever invalidated any Virginia tax law or policy as violative of the 4-R Act.

From the turn of the century until 1984, the state agency in Virginia responsible for determining the fair market value of railroad property for local tax purposes was the Virginia State Corporation Commission (the "SCC"). The SCC used the inventory and summation method exclusively during this entire period.[1] In 1983,

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[1] The SCC calculated the fair market value of railroad land by comparing it with adjacent property. This "across-the-fence" method based the value of the railroad realty on the value of the immediately adjacent land. At the request of the railroads, the SCC adopted the Interstate Commerce Commission's parcelization of railroad land for its across-the-fence

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the Virginia General Assembly transferred the duty of assessing railroad property to the Virginia Department of Taxation (the "Department"). Ch. 570, 1983 Va. Acts 768-777. Although the transfer legislation did not authorize a change in assessment methodology, the Department began using the unit method in its annual assessments of railroad property, and determined the 1984 railroad assessments under this method. The new assessments were challenged by several local governments, including Arlington County and the City of Alexandria, which filed suit against the Commonwealth of Virginia and the Richmond, Fredericksburg and Potomac Railroad Co. ("RF&P"). Alleging that the use of the unit method violated Article X, Section 2 of the Constitution of Virginia (1971),[2] the localities sought a judgment ordering a return to the inventory and summation method for determining the value of railroad property. *See County Board of Arlington v. Commonwealth of Virginia, et al.*, 240 Va. 108, 393 S.E.2d 194 (1990) [hereinafter *County Board*].

The Supreme Court of Virginia agreed with the localities' argument that the unit method provides only a "use value" for the railroads' real estate, "influenced by

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appraisal purposes. The value of all other railroad property was based on the original investment, minus a fixed percentage of that investment – which varied depending on the property – as an allowance for depreciation. *See Forst*, 938 F.2d at 529.

[2] Article X, Section 2 provides, in part, that "[a]ll assessments of real estate and tangible personal property shall be at their fair market value. . . ."

many elements unrelated to the land and its improvements," and "does not produce the fair market value of the specific property being appraised." *Id.* at 112-113, 393 S.E.2d at 196-97. The Court struck down the unit method as violative of the fair market value requirement of the Virginia Constitution, declared the assessments of RF&P's property invalid, and ordered further proceedings in the state trial court for a redetermination of the assessments. *Id.* at 114, 393 S.E.2d at 197. Since the remand, other localities have filed state court suits against the Department and the railroads seeking a judicial determination of the value of the railroads' property in their respective jurisdictions. *See CSX v. Forst*, 777 F.Supp. 435, 441, 444 n.2 (E.D. Va. 1991).

RF&P did not assert a defense based on the 4-R Act in the state court proceedings, nor did it seek an appeal of the Supreme Court of Virginia's judgment to this Court. Instead, RF&P and the other Petitioners sought to stay the ongoing state court proceedings after filing the instant suit in federal district court asserting, in effect, that the unit method was the only accounting methodology permissible under the 4-R Act. Petitioners supported this contention with experts' affidavits and deposition testimony showing, at most, that an assessment of railroad property under the inventory and summation method would result in a greater aggregate value for railroad property than the value of the railroad as a business entity determined under the unit method. Aside from these conclusions, Petitioners offered no other evidence showing that the assessment under the inventory and summation method would not represent the fair market value of specific railroad properties.

Although the District Court was concerned that Petitioners were attempting to collaterally attack the Virginia Supreme Court's decision in *County Board, supra,* it did not expressly decide the case on that basis. The District Court, however, did grant summary judgment for Respondents, holding that "the language and legislative history of the Act make clear that it does not impose a particular method of taxation on the state," and that Petitioners' evidence did not create a factual issue on the claim of discriminatory taxation. *Forst,* 938 F.2d at 530. Petitioners appealed. The United States Court of Appeals for the Fourth Circuit affirmed, and denied a petition for rehearing on September 24, 1991.

The record in this case does not provide an appropriate vehicle for this Court to consider the issues Petitioners seek to raise. Congress clearly did not intend for the federal courts to displace a state's *policy* choice concerning the most appropriate method for determining true market value of railroad land at the whim of the railroads, and there is no evidence to suggest that Virginia adopted its methodology to circumvent the requirements of the 4-R Act. Furthermore, because the courts below decided the case on other grounds, the record in this case remains clouded with such questions as whether the Petitioners may be collaterally estopped from proceeding in federal court even if a remand were ordered, and whether the ongoing state court proceedings concerning the local tax assessments for the several Petitioners may require federal court abstention. For all of these reasons, plenary review by this Court is unwarranted, and the Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The Decision Below Was Correct

A. The 4-R Act Does Not Require or Preclude a Particular Form of Railroad Property Valuation.

Petitioners' primary argument (Pet. 11) is that if railroads cannot challenge the state's method of valuing railroad property, the state may select a method that is inherently discriminatory. This argument is flawed for several reasons. Initially, it builds on at least two suppositions that, although perhaps warranted in litigation from some other state that may come before the Court, simply are not true in this case.

While Congress may have found that the railroads' inability, as a general proposition, to protect their interests in state legislatures necessitated some form of intervention such as the 4-R Act, it does not necessarily follow that such conditions exist now, or ever existed, in Virginia. To the contrary, the railroad lobby has influenced Virginia legislation concerning the taxation of railroads, including the very issue in this case (*i.e.*, the method of valuing railroad property for local tax purposes, *See Norfolk & Western*, 211 Va. at 699, 179 S.E.2d at 629), and other significant issues.[3] Simply put, the railroad lobby has been effective in Virginia.

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[3] The unique apportionment of multistate railroads' income is another example. *Cf.* Va. Code §§ 58.1-408 and 58.1-420 (1991 Repl. Vol.). When § 58.1-420 was enacted, thirty (including the District of Columbia) of the thirty-six states that

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Petitioners also purport to include Virginia among those states they perceive as resisting the Congressional directives embodied in the 4-R Act (Pet. 4, 12). That characterization is baseless. Virginia enacted legislation that was designed to comply timely with the 4-R Act and that effected more than mere cosmetic changes to Virginia law, including repealing the railroad gross receipts tax, amending the sales tax to ensure continued exemption for the railroads, and extending the state income tax and state franchise taxes applicable to other industrial and commercial taxpayers to railroads. *See* Va. Dept. of Taxation, Research Division, *1978 Legislative Digest* 3-4 (May 1978). Moreover, no 4-R Act challenge to Virginia's taxation of railroads, whether in state or federal court, has been upheld to date (in addition to this case, *see RF&P v. SCC*, 230 Va. 260, 336 S.E.2d 896 (1985), and *RF&P v. Dept. of Taxation*, 762 F.2d at 375 (4th Cir. 1985)).

A more striking flaw in Petitioners' theory derives from the statute itself. The 4-R Act prohibits tax discrimination against railroads. It does not, however, prohibit any particular form of tax. There is nothing inherently suspect about Virginia's constitutional directive to tax

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taxed railroads' income used some form of the 3-factor apportionment formula that Virginia required other multistate corporations to use for state income tax purposes. No state then employed the "loaded car mile" formula Virginia adopted. Runke & Finder, *State Taxation of Railroads and Tax Relief Programs*, App. 2, at 71-107 (Nov. 1977) (published by The Council of State Governments) [hereinafter *State Taxation*].

real property – whether owned by railroads or other taxpayers – at fair market value. Indeed, this state law requirement dovetails with the 4-R Act.

Petitioners sought to prove that under the inventory and summation assessment the Department was about to make, the ratio of the railroad properties' fair market value to assessed value would exceed similar ratios derived for other commercial and industrial properties in Virginia by more than 5%. *See* 49 U.S.C. § 11503(c) (4-R Act standard for discrimination). Significantly, however, nothing in the language of the 4-R Act expressly limits a state's choice of methods to estimate the fair market value of railroad property.[4] Nor does other federal law limit the methods appropriate for estimating the fair market value of railroad property.

For instance, the Interstate Commerce Act recognizes that more than one methodology may be appropriate for determining the value of specific railroad properties. The Interstate Commerce Commission (the "ICC") was charged with the duty of establishing the current value of all carrier lands and the reproduction cost for "each piece" of carrier property other than land. 49 U.S.C.

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[4] This is not surprising when one considers the many accepted methods of determining the fair market value of land, as well as other property, and that more than one method often is used to estimate the fair market value of specific property at any given time. Indeed, if more than one appraisal method is used, there is nothing in the 4-R Act, or the resulting case law, that would require a state to use the least onerous method of valuing railroad property (from the railroads' perspective) if each of the methods used produced a tax assessment within the statute's acceptable range.

§§ 10781, 10782. Those statutes implicitly authorize an inventory and summation method when the goal is to measure the value of specific railroad properties. *See Southern Pacific Trans. Co. v. Commissioner*, 75 T.C. 497, 828 (1980) (indicating that ICC determinations were intended to measure fair market value). Although the 4-R Act required the ICC to submit to Congress proposed revisions to laws related to interstate commerce, the resulting legislation (P.L. 95-473, 4 U.S. Code Cong. & Admin. News, 95th Cong., 2d Sess., 3009, 3013 (1978)) did not substantively amend 49 U.S.C. §§ 10781, 10782. Thus, there was no indication that the methods contemplated thereby for determining the value of railroad assets were called into question by the 4-R Act. Since *County Board* also contemplates determining the value of specific railroad properties, it is difficult to understand how the 4-R Act now precludes Virginia from using an inventory and summation method to that end for local tax purposes.

In this context, the full reach of Petitioners' claims becomes clear. Petitioners, in effect, seek an exemption from Virginia's constitutional requirement of taxing property at its fair market value. Indeed, Petitioners do not want their specific properties taxed at all. Rather, they want Virginia to use the unit method to tax railroads as business entities. From this perspective, the conclusion of the Court of Appeals that the 4-R Act "does not provide a basis . . . to challenge a state's preferred methodology for ascertaining the . . . value of railroad property" is an understatement. The 4-R Act does not limit the objects of nondiscriminatory state taxes. The decision below should stand and it in no way precludes federal court review of properly pleaded 4-R Act claims.

B. Summary Judgment Was Appropriate Because Petitioners Did Not Meet Their Burden of Proof.

The case below also was decided correctly on summary judgment because Petitioners failed to introduce competent evidence establishing any disputed facts. Petitioners cannot justify that failure by contending that the unit method is the only way to value railroad property. There is nothing in the 4-R Act that requires states at the behest of railroads to tax the going concern value of railroad businesses rather than taxing the fair market value of the railroads' specific properties, as Virginia and several other states were doing when the 4-R Act was enacted. *State Taxation, supra* at 27. While Congress could have indicated expressly that the 4-R Act contemplated valuing property only under the unit method – a method which had been used to value railroads as business entities for approximately one hundred years, J. Bonbright, *The Valuation of Property* 637 (1937) – it did not do so.

Moreover, the unit method is not the only recognized way to value railroad property. *See* Dolman & Seymour, *Valuation of Transportation/Communication Corridors,* The Appraisal J. 509 (Oct. 1978); Zoll, *Rail Corridor Markets and Sale Factors, id.* 504 (Oct. 1991) (indicating several methods are appropriate to value railroad assets in various circumstances). Simply put, there was no reason Petitioners could not have proffered an alternative fair market value of their property in order to prove their claim without relying solely on the unit method. Having failed to take advantage of that opportunity, Petitioners are left with the hollow argument that allowing a state to select a particular method of valuing railroad property

contravenes the 4-R Act's intended purpose. It clearly does not.[5] In sum, the record does not contain any evidence from which Petitioners could establish the value of their property, a necessary element of a 4-R Act case for which Petitioners had both the burden of production and the burden of proof. That failure justified summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Viewed from that perspective, this case does not warrant further review.

II. There Is No Conflict Among the Circuit Courts.

Despite the egregious error Petitioners perceive in the decision below, they fail to identify any conflict within the circuit courts of appeals. Petitioners' contention (Pet. 21-23) that the court of appeal's *dicta* in *Burlington Northern R.R. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990) [hereinafter *James*] requires this Court's intervention is unpersuasive.

While the court's *dicta* in *James* may have characterized the distinction between "methodology" and "application" in these cases as "thin", 911 F.2d at 1301,

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[5] The representation in the District Court that Petitioners would not limit their case to the unit method is of no consequence. All of Petitioners' evidence of record was based on the unit method. If counsel's assurances that evidence was forthcoming were sufficient to preclude summary judgment, every case filed in federal court would be tried on the merits. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (party must raise more than mere metaphysical doubt about dispute over material facts to preclude summary judgment).

there is no question that the issue in *James*, as stated by the court, was "one involving the *application* of an *accepted methodology*." *Id.* (Emphasis added). This is evident from the facts in the case. In *James*, the railroad alleged that Minnesota, which generally did not tax corporate *personal* property, included some portion of personal property in its assessment of the railroad's *real* property – an allegation which, if true, concededly would violate the 4-R Act. But the railroad expressly stipulated that it was not challenging the methodology employed by the state to derive the *value* of its property. Rather, it was challenging the application of the state's "accepted methodology" to its personal property. *Id.* at 1299. The court in *James* even assumed, for purposes of discussion, "that a challenge to valuation methodology is beyond the scope of the [4-R Act] – [and] correctly states the law in this circuit . . . " *Id.* Thus, the court's remand instructions in *James* – "that the district court make findings on whether any of [the railroads'] personal property was taxed," *id.* – creates no conflict with the decision below.

Also unpersuasive is Petitioners' reliance (Pet. 23) on district court decisions from other circuits to establish a "conflict" warranting this Court's attention. In so doing, Petitioners ignore the function of the courts of appeals within the federal judiciary. The courts of appeals provide a forum for appeals of right from trial courts within the federal system. This process serves the dual purposes of providing all litigants an opportunity for further judicial review without unnecessarily overburdening this Court.

Petitioners' erroneous assumption that "conflicts" at the district court level automatically translate into

conflicts among the circuits usurps the role of the courts of appeals and needlessly expands this Court's docket. Petitioners offer no justification for the disruption within the federal judicial system that granting their petition would encourage and endorse.[6] This case presents no real conflict, and this Court should decline further review.

III. Review by This Court Is Not Warranted.

A. The 4-R Act Does Not Permit Collateral Attacks on State Court Decisions.

The record below presents a substantial obstacle to reviewing the issues Petitioners seek to raise in this Court. The problem that Petitioners could not overcome in the District Court, and that now confronts this Court, is that the Supreme Court of Virginia, in a case in which one of the Petitioner railroads was a party, held that the unit method measures the value of a railroad as a business entity rather than the fair market value of its property. *County Board, supra.*[7] No party to that litigation

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[6] Justice Stevens recently observed in a slightly different context that "the federal judiciary has done a magnificent job of handling a truly demanding appellate workload," and noted that "only the most extraordinary circumstances" would justify this Court's intervention before giving the courts of appeals every opportunity to resolve cases properly before them. *In Re Blodgett*, 60 U.S.L.W. 3476, 3477 (Jan. 13, 1992) (not appropriate for Supreme Court to issue writ of mandamus ordering court of appeals to decide a case under advisement). For much the same reasons, this Court should withhold review unless and until an actual conflict develops among the circuits.

[7] The California Supreme Court reached the same conclusion in *ITT World Communications, Inc. v. San Francisco*, 210 Cal.

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sought further review of that decision. Since the Department had not actually assessed any railroad property after the decision in *County Board*, and that decision had not become final when Petitioners filed this suit, the effect, if not the purpose, of relying solely on unit method evidence of value was to collaterally attack the Supreme Court of Virginia's decision in *County Board* with the hope of forcing the Department to resume using the unit method. The principles of collateral estoppel and comity clearly precluded such an attack.

1. *Collateral Estoppel.* "As an aspect of a broader doctrine of *res judicata*, collateral estoppel is designed to eliminate the expense, vexation, waste and possible inconsistent results of duplicatory litigation." *Hoag v. New Jersey*, 356 U.S. 464, 470 (1958). When "determining the effect of a former judgment pleaded as an estoppel . . . [the court] must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy." *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 459 (1922). In the courts below, Respondents argued that Petitioners could not relitigate the appropriateness of the unit method. The District Court even discussed the attempt to collaterally attack the Supreme Court of Virginia's decision with both sides during the summary judgment hearing. The Fourth Circuit noted that the case had collateral estoppel implications but did not decide

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Rptr. 226, 693 P.2d 811 (1985). *See also Wallace v. Hines*, 253 U.S. 66, 69 (1920) (questioning whether the unit method measures the value of specific real property).

the case on that basis. *Forst*, 938 F.2d at 530 n.2. Since Respondents argued in both courts below that Petitioners could not relitigate the validity of the unit method, however, the application of the doctrine of collateral estoppel also supports the Fourth Circuit's decision.[8]

In *County Board*, the issue was whether the unit method measured the value of a railroad as a business entity without ascertaining the fair market value of any specific railroad property. 240 Va. at 112-14, 393 S.E.2d at 196-97. The Virginia Supreme Court expressly held that it did. *Id.* In the case below, Petitioners had the burden of establishing the fair market value of their property. Since the only evidence Petitioners offered to establish the value of their property derived from the unit method, they had to be claiming that such method reflected its value for *ad valorem* tax purposes in Virginia. The Supreme Court of Virginia rejected that argument in *County Board*. Thus, Petitioners had to be arguing that, *County Board* notwithstanding, the unit method measured the fair market value of their property. Since any such efforts are barred by the principles of collateral estoppel, the District Court properly granted summary judgment. From that perspective, this case does not warrant further review.

2. *Comity*. Our federal system of government places great importance on the concept of comity – "a proper

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[8] Although all of the Petitioners were not parties in *County Board, supra*, they are nonetheless collaterally estoppel as being in privity with RF&P. *See Robertson v. NBA*, 622 F.2d 34, 35 (2d Cir. 1980) (members of the same class disputing the same economic concept are bound by decision even if the computation of individual benefits might differ).

respect for state functions, a recognition . . . that the entire country is made up of a Union of separate state governments, and a . . . belief that the National Government will fare best if the states . . . are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Expounding on *Younger*, this Court held in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987), that when the state function involves the sovereign's judicial system, the requisite respect ensures that the state court's "orders and judgments are not rendered nugatory." It is difficult to imagine a more blatant attempt to render a state court's judgment nugatory than Petitioners' resort to the federal courts here.

However styled, this suit can only be viewed as a collateral attack on the Supreme Court of Virginia's rejection of the unit method in *County Board, supra*. Indeed, merely allowing Petitioners to proceed to trial in this case effectively would have overruled *County Board* since it would have legitimatized Petitioners' claim that the unit method appropriately measures the value of specific railroad property for local tax purposes in Virginia. That is precisely the argument Petitioner RF&P presented, and had rejected, in state court. Comity precludes such a collateral attack in federal court.

Pennzoil controls here, holding that absent extraordinary circumstances, litigants may not challenge non-final state court decisions in federal court. 481 U.S. 13-15. Despite Petitioners' contention that *County Board* did not

involve any federal issue,[9] there are no extraordinary circumstances here. Indeed, this Court noted in *Pennzoil* that "when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures [would] afford an adequate remedy, in the absence of unambiguous authority to the contrary." 481 U.S. at 15. Moreover, if state procedures afford an adequate remedy, attempted resort to the federal courts is inappropriate. *Id.* Since the 4-R Act gives state courts concurrent jurisdiction, comity suggests that this case was properly resolved without proceeding to trial. From that perspective, further review is not warranted.

B. Requesting a New Methodology Implicates Abstention.

Petitioners contend for the first time (Pet. 9) that after the decision in *County Board*, the Department should have tried to devise a new valuation method rather than reverting to the inventory and summation method. That contention is somewhat paradoxical since Petitioners filed this action before the Department assessed any

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[9] The localities sued in *County Board*, *supra* n.8, to stop the Department from valuing railroad property under the unit method for Virginia tax purposes. Since state courts have concurrent jurisdiction under the 4-R Act, Petitioners could have intervened and raised, or RF&P as a party could have raised, any federal claim litigated below. Hence, the only reason no federal claims were litigated in *County Board* is because Petitioners chose not to take advantage of the opportunity to raise them. Petitioners now must accept the consequences of that decision.

property, and more importantly, prevented resumption of the state court proceedings on remand. Nothing in the record indicates that the Department would not have used such proceedings to fashion a method of valuing railroad property that all interested parties (*i.e.*, the Department, all railroads, and all taxing localities) could accept. For present purposes, however, this eleventh-hour complaint provides another reason not to grant the writ.

If Petitioners are sincere about wanting the Department to fashion a new method of valuing railroad property, the remedy available to them is the state court proceedings. Since Petitioners short circuited those proceedings by filing this suit in federal court, in other circumstances a reasonable response would be merely to note that they should not now be heard to complain. Here, however, Petitioners' belated complaint after collaterally attacking the decision in *County Board* implicates the concept of abstention.

The abstention doctrine derives from the concept of comity and the proper respect for state functions within our system of federalism. In the present context, abstention embodies the national policy against unnecessary federal court interference with pending state court proceedings absent extraordinary circumstances. *Moore v. Sims*, 442 U.S. 415, 423 (1979).

Although the categories of abstention often overlap,[10] this case primarily implicates the principles of

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[10] As this Court noted in *Pennzoil*, 481 U.S. at 11 n.9, "[t]he various types of abstention are not rigid pigeonholes into

(Continued on following page)

Younger and its progeny. Under *Younger*, abstention is appropriate if federal jurisdiction is invoked to enjoin or disrupt state proceedings involving important state issues. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976). *Pennzoil* teaches that maintaining the state judicial systems without undue federal interference is a sufficiently important state interest to warrant, or even require, abstention. That is also true here.

The test for *Younger* abstention has three prongs: (1) whether there are ongoing state judicial proceedings; (2) whether the proceedings implicate important state interests; and (3) whether there is an opportunity in the state proceedings to raise federal claims. *Middlesex Co. Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423, 432 (1982). All three prongs were satisfied in the present case.

Since the ongoing judicial proceeding inquiry looks not to whether the proceedings are active, but to the filing dates of the actions (*Bettencourt v. Board of Registration*, 904 F.2d 772, 777 (1st Cir. 1990)), the first prong was

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which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." In the present case, the concerns noted in *Burford v. Sun Oil*, 319 U.S. 315 (1943), also are implicated, since Petitioners have disrupted the only proceedings available to develop a coherent policy for local taxation of railroad property. Since there is considerable overlap in the *Younger* and *Burford* policy considerations and since *Younger* abstention would have been appropriate even without Petitioners' eleventh-hour complaint, for present purposes, and without waiving any right to argue subsequently the implications of *Burford*, this discussion will focus solely on *Younger* abstention.

met. As noted, the state judicial proceedings implicated sufficiently important state interests to warrant abstention. *Pennzoil v. Texaco*, 481 U.S. at 13. Finally, the state court proceedings provided an adequate opportunity to raise 4-R Act claims. *See RF&P v. SCC*, 230 Va. 260, 336 S.E.2d 896.

The unique series of challenges to Virginia's *ad valorem* taxation of railroad property, and the role of the unit method therein, warrants careful analysis. In effect, Petitioners stood to accomplish in this suit, which they filed in federal court before the Supreme Court of Virginia's decision in *County Board, supra*, became final, precisely what RF&P had failed to accomplish in *County Board* – *i.e.*, to require the Department to use the unit method to value railroad property. This is a classic scenario for *Younger* abstention. Indeed, in light of the expanded nature of the *County Board* proceedings on remand,[11] the case for *Younger* abstention becomes even more compelling.

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[11] The litigation concerning how to value railroad property quickly escalated after *County Board, supra* n.8. Forty-five localities filed suits in state court against the Department and the railroads owning property within their respective jurisdictions to determine the fair market value of railroad property for 1987, 1988 and 1989. *See CSX v. Forst*, 777 F. Supp. at 441, 444 n.2. Because the Department could not complete a reassessment for 1987 before the statute of limitations expired, there was no other way to determine that value for 1987. All major railroads operating in Virginia, or their parent companies, except Consolidated Rail Corp. and North Carolina & Virginia Railroad are parties in the state court proceedings. Consolidated Rail Corp. does not own property in Virginia although it has a right-of-way over the Pentagon grounds. In 1988, North

(Continued on following page)

The state court proceedings include both localities that gain tax revenues and localities that lose tax revenues under *County Board*. Moreover, those proceedings involve as defendants all major railroads operating in Virginia. Thus, all interested parties are before the state court.[12] The Supreme Court of Virginia's remand and the inability of other localities to have the value of railroad property otherwise determined for 1987 also establish the absence of bad faith. Thus, abstention was warranted when this suit was filed. Since denying the writ would end the instant federal court displacement of the state court proceedings, the Department asserts that this is the most expeditious means of accomplishing the goals of abstention at this time.

(Continued from previous page)

Carolina & Virginia Railroad owned a shortline in Southampton County that it purchased from CSX. Southampton County is a party in the state court proceedings.

[12] Since only localities that lost revenues under the unit method intervened at the District Court level, the interests of all taxing localities were not represented in that court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 91-1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the federal courts have jurisdiction, under the federal statute that prohibits state tax discrimination against railroads, to determine whether a state's property tax valuation methodology results in discriminatory overvaluation of railroad property.

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---

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONERS [1]

INTEREST OF AMICUS CURIAE

The Association of American Railroads ("AAR") is a nonprofit trade association representing the Nation's major railroads. Its members account for approximately 82 percent of the line haulage, employ 93 percent of the workers, and produce approximately 94 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern.

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[1] Petitioners and respondents have consented to the filing of the brief. The letters signifying consent have been filed with the Clerk.

As the trade association for the Nation's railroads, AAR has a vital interest in preserving the integrity of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, recodified at 49 U.S.C. § 11503 ("Section 11503").[2] Section 11503 was enacted by Congress to prohibit and provide a federal remedy against discriminatory state taxation of railroads, a widespread and long-standing practice that Congress found to seriously weaken the Nation's railroads and to "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503(b). AAR, on behalf of the railroad industry, participated in the legislative process that culminated in the passage of Section 11503 and has an important stake in ensuring that the reforms enacted by Congress in that remedial legislation are not lost to the industry or attenuated through improper judicial construction of Section 11503's provisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) ("*Oklahoma Tax Comm'n*"), this Court held that state tax discrimination resulting from overvaluation of railroad property by state tax officials is included in the broad prohibitions of Section 11503. The Court also held in *Oklahoma Tax Comm'n* that U.S. district courts, in exercising their remedial authority under Section 11503, are necessarily empowered to determine the "true market value" of both railroad and non-railroad property in order to determine if discrimination resulting from overvaluation of railroad property exists. *Id.* at 461. Because the railroad overvaluation challenge in

[2] There are some differences in language between Section 306 as originally enacted [§ 306 of Pub. L. No. 94-210, 90 Stat. 31, 54 (1976)] and as subsequently recodified at 49 U.S.C. § 11503. The recodification, however, was not intended to effect any substantive change. *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Further references will be to the statute as recodified.

Oklahoma Tax Comm'n was directed at the unfair application of the state's valuation methodology rather than at the state's choice of methodology itself, however, this Court did not address, and expressed no view on, an issue not there presented: "whether a railroad may, in an action under § 11503, challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad's value or is instead restricted to challenging the factual determinations to which the State's preferred accounting methods were applied." *Id.* at 463 n.5.

The question reserved by this Court in *Oklahoma Tax Comm'n* is directly presented by the Fourth Circuit's decision in the case at bar. That decision, if allowed to stand, will render the discrimination prohibitions of Section 11503 effectively meaningless. In the instant case, railroads operating in Virginia sought to challenge, as violative of the discrimination prohibitions of Section 11503, the methodology employed by the State of Virginia for valuing railroad property (the "inventory and summation" method).[3] The railroads contended that Virginia's valuation methodology, through arbitrary parcelization of railroad land and inconsistent application of "highest-and-best-use" valuation principles, sytematically

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[3] Under Virginia's "inventory and summation" method, railroad land (including rights-of-way) is artificially divided into parcels and its "highest-and-best-use" is assumed to be a non-rail use equal to that of adjoining or nearby land ("across-the-fence" value). Railroad property other than land (including roadway, track and operating improvements located on railroad rights-of-way) are separately valued and attributed a rail-use value equal to original cost less depreciation. Pet. at 7-8.

The methodology employed by Virginia is different from that of any other state. Most states that impose a property tax on railroads use one or more unitary valuation methodologies. Under a unitary approach, the railroad is valued as a whole, based on capitalized income and/or other valuation factors, and a portion of that value is allocated to the states and localities in which the railroad operates. *See Oklahoma Tax Comm'n*, 481 U.S. at 459; Pet. App. at 2a-3a.

overvalued railroad property in relation to non-rail property and resulted in assessment ratio discrimination prohibited by Section 11503.

The railroads' discrimination claim was rejected by the district court on summary judgment.[4] On appeal, the Fourth Circuit affirmed the dismissal of the railroads' challenge. In passing upon the question reserved in *Oklahoma Tax Comm'n*, the Court of Appeals held that "[w]e conclude that [§ 11503] does not provide a basis for railroads to challenge a state's preferred methodology for ascertaining the true market value of railroad property." Pet. App. at 10a. As grounds for its ruling, the court below found the language of Section 11503 to be "ambiguous" and concluded that the "admittedly rather thin" legislative history suggested that "Congress did not intend for courts to displace the state's policy choice" with respect to valuation methodology (Pet. App. at 6a). The court below also cited as grounds for its ruling Congress' "general proscription on federal interference in state taxation decisions (*Id.* at 10a)," and the "difficult task" that the courts would have to perform if they were required to determine "which assessment methodology produces true market value of railroad property" pursuant to a Section 11503 discriminatory overvaluation challenge (*Id.* at 10a).

The decision of the Fourth Circuit shielding a state's choice of methodology for valuation of railroad property from challenge under Section 11503 is wrongly decided and is inherently destructive of the statutory scheme. The decision ignores the clear language and

[4] The district court noted that Section 11503 "does not impose a particular method of taxation on the State (Pet. App. at 13a)" and found that expert testimony by the Virginia State tax official responsible for valuing railroad property in Virginia describing how the "inventory and summation" method resulted in significant overvaluation of railroad property in the State was insufficient to create a factual issue. Pet. App. at 14a.

purpose of Section 11503, which is directed at the elimination and prohibition of all forms of state tax discrimination against railroads by whatever means inflicted. The decision also deprives the statutory scheme of any practical effect by providing a ready means by which state tax authorities may wholly circumvent the statute's prohibitions against discriminatory taxation of railroads through the simple expedient of devising valuation methodologies that systematically discriminate against railroad property. Moreover, the decision conflicts with the reasoning employed by this Court in *Oklahoma Tax Comm'n* in upholding discriminatory overvaluation challenges under Section 11503. The decision below is also inconsistent with decisions in other circuits declining to apply, and questioning the efficacy of, a jurisdictional bar to Section 11503 challenges predicated on whether a state's choice of "methodology" is ostensibly at issue .

Because the decision below is inherently destructive of the statutory scheme, will encourage state tax officials in efforts to evade Section 11503's prohibitions, and will compound existing uncertainty and lack of uniformity in the application and enforcement of Section 11503, this Court should now resolve the issue reserved in *Oklahoma Tax Comm'n* as urged by petitioners. The AAR therefore strongly supports the petition for a writ of certiorari.

ARGUMENT

I. THE JURISDICTIONAL BAR TO VALUATION METHODOLOGY CHALLENGES ESTABLISHED BY THE COURT BELOW IS CONTRARY TO THE LANGUAGE AND PURPOSE OF SECTION 11503 AND PROVIDES A READY MEANS BY WHICH STATE TAX AUTHORITIES MAY NEGATE THE FEDERAL REMEDIES AGAINST STATE TAX DISCRIMINATION PROVIDED BY SECTION 11503

A. The Language and Purpose of Section 11503

Congress has long been aware that state property taxation of railroads has operated, over the course of many years, in a discriminatory fashion against the railroad industry. S. Rep. No. 91-630, 91st Cong., 1st Sess. 1-8 (1969); H. Rep. No. 94-725, 94th Cong., 1st Sess. 76-78 (1975). Congress has also long been aware that the effect of discriminatory state taxation upon the railroad industry has been massive and persistent,[5] and that such tax discrimination operated to seriously weaken the national transportation system (as well as unfairly burden shippers and consumers with excessive transportation costs). See, e.g. S. Rep. No. 91-630, pp. 3-8; H. Rep. No. 94-725, p. 78.

In 1976, after 15 years of congressional investigation and intermittent legislative action, Congress passed Section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act), codified at 49 U.S.C. 11503, with the purpose of ending the problem of discriminatory

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[5] After extensive investigation, Congress concluded that "railroads are over-taxed by at least $50 million each year." H. Rep. No. 94-725, p. 78 (1975); *Oklahoma Tax Comm'n*, 481 U.S. at 457. Congress was also aware that railroads "are easy prey for State and local tax assessors" because they are "nonvoting, often non-resident, targets for local taxation, and cannot easily remove their rights of way and terminals." S. Rep. No. 91-630, p. 3; *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 131 (1987).

state taxation of railroads.[6] The solution Congress embodied in Section 11503 was "a prohibition on discriminatory state taxation of railroad property." *Oklahoma Tax Comm'n*, 481 U.S. at 457. Section 11503(b) "in broad terms" (*id.* at 457) provides that a state engages in unlawful tax discrimination when it acts to:

> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Section 11503 also prohibits state taxation of railroad property at a rate higher than that generally applicable to other commercial and industrial property in the same assessment jurisdiction (Section 11503(b)(3)) and broadly prohibits a state from imposing any other tax that discriminates against a rail carrier (Section 11503(b)(4)).

To afford an effective federal remedy, Section 11503(c) provides that federal district courts may grant injunctive relief to prevent violations of Section 11503, notwithstanding the provisions of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.[7] Section 11503(c) specifically provides that in an action under Section 11503, "[t]he burden of proof in determining assessed value and true market value is governed by State law."

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[6] The 4-R Act also contained broader reforms the purpose of which, as stated in the Congressional declaration of policy, was "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." § 101(a).

[7] 28 U.S.C. § 1341 generally deprives federal district courts of jurisdiction to enjoin state taxation unless there is a showing that a "plain, speedy, and efficient remedy" is not available in the state courts.

B. The Jurisdictional Bar to Methodological Challenges Established by the Court Below Is Contrary to the Language and Purpose of Section 11503 and Conflicts with this Court's Reasoning in *Oklahoma Tax Comm'n*

In its decision below, the Fourth Circuit found that the language of Section 11503 is "ambiguous" on the question "whether a railroad may challenge . . . the particular accounting method a state has determined to best estimate true market value." Pet. App. at 6a. The court below, wholly predicated on extra-statutory considerations, then went on to find that discriminatory overvaluation challenges predicated on state choice of valuation methodology do not fall within the remedial provisions of Section 11503. The Fourth Circuit's decision is contrary to the clear and unambiguous language and purpose of Section 11503, does violence to the remedial scheme established by Congress in Section 11503 and must be reversed by this Court.

The court below made no effort to demonstrate the specific basis for its conclusory assertion that the statutory terms are "ambiguous" in any respect on the issue presented. Indeed, the court below appears to predicate its conclusory assertion solely on the basis that this Court *reserved* the issue, as not presented, in *Oklahoma Tax Comm'n*. Pet. App. at 6a. In *Oklahoma Tax Comm'n*, however, this Court did not find the provisions of Section 11503 to be ambiguous in *any* respect but instead found the statutory language and purpose "clear." *Id.* at 461. The Court simply "express[ed] no view" on a question not then before it. *Id.* at 463 n.5. This Court's decision in *Oklahoma Tax Comm'n* thus cannot be employed by the court below—as it improperly did—to "bootstrap" itself over the insurmountable hurdle before it—the language of the statute the court is charged with construing.

Contrary to the Fourth Circuit's decision, the language of Section 11503 is clear and unambiguous and embraces

within its scope state tax discrimination against railroads effected either through unfair application of the state's valuation methodology (as specifically held by this Court in *Oklahoma Tax Comm'n*) or through direct choice of a discriminatory valuation methodology itself. Indeed, neither the language nor the purpose of the statute makes a distinction in this regard.

Pursuant to Section 11503(b)(1), a state is specifically forbidden to "assess rail transportation property at a value that has a higher ratio to true market value . . . than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." Under this provision, Congress established an objective, ratio-based test for determining whether state tax discrimination exists and specifically charged the federal judiciary with determining assessed value and true market value for both railroad and non-railroad property to evaluate a claim of state tax discrimination. Section 11503(c); *cf. Oklahoma Tax Comm'n*, 481 U.S. at 462 (Section 11503(c) generally provides that assessed value and true market value are proper subjects for judicial inquiry and are to be proved under burdens allocated by state law). The language used by Congress in Section 11503(c) is broadly inclusive of any form of state tax discrimination against railroad property resulting from disparate assessment value/true value ratios between rail and non-rail property; is specifically intended to effect a blanket statutory "prohibition on discriminatory state taxation of railroad property" (*Oklahoma Tax Comm'n*, 481 U.S. at 457); and makes no exception for state tax discrimination effected through methodological manipulation of railroad property values as the Fourth Circuit would have it.[8]

[8] The only specific limitation established by Congress is set forth in Section 11503(c). That provision provides that "[r]elief may be granted under this subsection only if the ratio of assessed value

Indeed, this Court's decision in *Oklahoma Tax Comm'n*, although not passing on the issue decided by the court below, is highly instructive as to the congressional objective and broad remedial purpose expressed in the specific language employed by Congress in Section 11503. In *Oklahoma Tax Comm'n*, this Court specifically rejected a contention by state tax authorities—predicated essentially not on the language of Section 11503 but on their view of the legislative history of that Section—that "whatever the State determines the value of the railroad to be, the resulting assessment ratio is not subject to further judicial scrutiny in the federal courts." *Id.* at 461-462.[9] As found by this Court in rejecting such a contention as contrary to the clear congressional purpose set forth in the language of Section 11503:

> The parties have canvassed at length the 15-year legislative history of the Act, and of the protection against discriminatory state taxation which became § 11503. We find the results of that investigation inconclusive and irrelevant. Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly ex-

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to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction." This provision is a prohibition on the litigation of *de minimis* disparate impact claims in the federal courts. *Oklahoma Tax Comm'n*, 481 U.S. at 464.

[9] The legislative history relating to an early version of Section 11503 indicates at most that Congress did not intend to require states to adopt a single uniform valuation methodology that would be standard. S. Rep. No. 1483, 90th Cong., 2d Sess. App. B (1968); see Pet. App. at 6a-7a. The legislative history makes clear, however, that Congress viewed true market value as an objective standard "to which values that have already been determined must be compared." *Id.* The language of Section 11503 reflects this legislative intention by employing an objective ratio test for state tax discrimination under which federal courts are empowered to inquire into both assessed value and true market value determinations by state authorities to determine if discrimination exists.

> pressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" [citations omitted] . . . .
>
> In the present case, the language of § 11503 plainly declares the congressional purpose. . . . It is clear from this language that in order to compare the actual assessment ratios [of railroad and nonrailroad property], it is necessary [for a federal court] to determine what the "true market values" are.

Id. at 461. This Court in *Oklahoma Tax Comm'n* thus found that Congress expressly meant what it said in the broad remedial language employed in Section 11503. That language clearly embraces, and provides a federal remedy against, all forms of state tax discrimination against railroad property whether inflicted through discriminatory methods of determining "true market value" of railroad property or other discriminatory practices. As this Court further held in *Oklahoma Tax Comm'n*, the addition of limiting language—such as that imposed by the Fourth Circuit's decision which would preclude federal courts from making an independent determination of the true market value of railroad property where issues of "methodology" are ostensibly presented—"requires amendment rather than construction of the statute" and must be rejected. *Id.* at 463.[10]

In light of the clear statutory language and congressional purpose of Section 11503—which is intended to prohibit all forms of state tax discrimination against railroad property—it is the responsibility of the federal judi-

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[10] Moreover, in *Oklahoma Tax Comm'n* this Court also rejected the basis for the Fourth Circuit's reliance on principles of "comity" in construing the language and purpose of Secion 11503. As noted in *Oklahoma Tax Comm'n* with respect to Congress' express adoption in Section 11503(c) of an exemption from the provisions of the Tax Anti-Injunction Act, 28 U.S.C. § 1341, "these are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now." *Id.* at 464.

ciary to implement the congressional purpose as set forth in the statutory requirements of Section 11503. It is emphatically not the role of the federal judiciary to avoid that task—as the Fourth Circuit did—because it may be difficult or may countermand state policy in a particular case.[11] Indeed, as explained below, for the remedial scheme established by Congress in Section 11503 to remain effective it is *essential* that methodological loopholes not be provided through which state tax authorities may channel ongoing efforts to impose discriminatory taxes on the railroad industry free from federal remedies provided under Section 11503.

C. The Jurisdictional Bar to Methodological Challenges Established by the Court Below Provides a Ready Means by which State Authorities May Negate the Federal Remedies Provided by Section 11503

Not only is the jurisdictional bar to challenges to discriminatory state valuation methodologies imposed by the court below contrary to the language and purpose of Section 11503, it also provides an easy means by which state tax authorities may wholly negate the federal remedies against state tax discrimination provided by Section 11503.

As is apparent, state tax authorities, by adopting valuation methodologies for railroad property that systematically value railroad property in excess of true market value, may achieve discriminatory results *identical* in scope to that obtainable through other forms of tax discrimination proscribed by Section 11503 (e.g., application of a higher tax rate to railroad property or sys-

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[11] As noted in the petition for certiorari, a market value determination under Section 11503 is not appreciably different from valuation determinations routinely made by courts in condemnation, estate tax, shareholder assessment and other proceedings where decisions are based on expert testimony. *See* Pet. at 19.

tematic undervaluation of non-railroad property).[12] Thus, to impose a jurisdictional bar to Section 11503 discriminatory overvaluation challenges where the discrimination is effected by the state through "methodological" means—as the court below did—creates a gaping loophole in the statutory scheme.

In light of the vulnerability of the railroad industry to discriminatory state and local taxation and the long-standing and ongoing efforts of state authorities to impose discriminatory taxes on the industry,[13] that loophole can and will be fully exploited by the states—through the simple means of devising valuation methodologies that systematically overvalue railroad property—to wholly defeat the prohibitions and federal remedies provided by Section 11503. Indeed, in its decision below, the Fourth Circuit did not even attempt to address this necessary and perverse result of its decision imposing a jurisdictional bar to challenges to discriminatory state valuation methodologies.

As Congress noted in the course of enacting Section 11503, "interstate carriers, especially railroads, are easy prey" for state discriminatory tax practices. S. Rep. No. 92-1085, 92d Cong., 2d Sess. 4 (1972); *see also* S. Rep. No. 91-630, at 3.

> They are non-voting, often non-resident targets for local taxation, and cannot remove their rights-of-way

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[12] As this Court made clear in *Oklahoma Tax Comm'n*, there is no intent requirement in Section 11503. "Subsection [11503(b)] speaks only in terms of 'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." *Id.* at 463. It is thus irrelevant to the statutory prohibitions under Section 11503 whether discriminatory valuation methodologies are established by states through express design or through "good faith" valuation efforts.

[13] In their petition, petitioners provide numerous examples of continuing state efforts to impose discriminatory taxes against railroads. See Pet. at 4 n.2, 6 n.4. As the petition further notes, only Section 11503 effectively bars the way to such state efforts. *Id.*

> and terminals even if the burden of tax discrimination becomes heavy. Their statutory obligation as regulated common carriers further roots them to their location since they are obligated to provide service to the locality. Railroads are particularly subject to discriminatory taxation since they have the largest investment in fixed plant. . . .

S. Rep. No. 92-1085, at 4.

Indeed, for the year 1986 (the last year for which such figures are publicly available), the assessed value of railroad property subject to state ad valorem taxes in all state jurisdictions totalled in excess of $6,630,000,000. *1987 Census of Governments*, U.S. Department of Commerce, Bureau of the Census, at Volume 2, Table 2, p.5. This figure is significantly less than the actual total for two reasons. First, the figure does not include locally assessed property. In addition, 19 states did not report the assessed value of railroad property subject to property tax in their jurisdiction. *Id.*

Moreover, the potential revenues available to states through ad valorem property taxes on railroads are enormous. In 1990, based on aggregate figures set forth in Annual Reports (R-1) filed with the Interstate Commerce Commission, total ad valorem taxes assessed in 1990 for all Class I railroads in all state jurisdictions totalled $281,436,000. This figure does not include taxes assessed on Class II and Class III railroads, which constitute approximately 24 percent of the Nation's railroad mileage.[14] Thus, the incentive for state tax discrimination against the railroad industry is as great today as it was in 1976 when Congress first enacted Section 11503.

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[14] Under carrier classifications adopted by the Interstate Commerce Commission, a Class I railroad is defined as a carrier with annual operating revenues of $94.4 million or more. A Class II carrier has annual operating revenue of less than $94.4 million but more than $18.9 million. A Class III carrier has annual operating revenues of $18.9 million or less. (The annual revenue figures are adjusted for inflation.) 49 C.F.R. § 1.01(A)(1-1)(a)-(d).

Congress specifically enacted Section 11503 because it found that the states, if left to their own devices, would not take effective action against tax discrimination against railroad property. See, e.g., S. Rep. No. 91-630, pp. 7-8; S. Rep. No. 92-1085, p. 4. The decision of the court below, by imposing a jurisdictional bar to Section 11503 challenges to state tax discrimination effected through methodological means, brings the legislative process back to square one by providing the states a ready means of imposing discriminatory taxes on railroads while totally avoiding federal injunction remedies under Section 11503. Such result, which effectively defeats the entire remedial scheme established by Congress in Section 11503, should not be countenanced by this Court.

* * *

As set forth in the petition for writ of certiorari, the decision of the court below is also inconsistent with decisions in other circuits declining to apply, and questioning the efficacy of, a jurisdictional bar to Section 11503 challenges predicated on whether a state's "choice of methodology" is ostensibly at issue. Pet. at 19-25; *see Burlington N.R.R. Co. v. James*, 911 F.2d 1297, 1301 (8th Cir. 1990); *ACF Indus. v. California State Bd. of Equalization*, No. C-89-3449, slip op. at 25 n.3, 27 n.7 (N.D. Cal. Sept. 13, 1991); *see also Atchison T.&S.F. Ry. v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986), *abstention order vacated*, 828 F.2d 9 (9th Cir. 1987).

As the petition further notes, other federal courts have seized upon the question reserved in *Oklahoma Tax Comm'n* as permitting the imposition of a "choice of methodology" jurisdictional bar to Section 11503 relief, resulting in a growing disarray in the lower courts on this issue. Pet. at 21-25; *see*, e.g., *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543 (D. Utah 1988); *Burlington N. R.R. v. Department of Revenue of the State of Washington*, Nos. C89-518 (T) WD & C90-5417

(T) WD (W.D. Wash. Nov. 27, 1991). Prompt review of the decision below by this Court is therefore necessary not only to preserve the integrity of the remedial scheme enacted by Congress in Section 11503 and to forestall state efforts to circumvent the statutory prohibitions against discriminatory taxation of railroads, but to ensure the uniform and proper administration of Section 11503 by the federal judiciary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHESAPEAKE WESTERN RAILWAY, *et al.*,
Petitioners,

v.

TAX COMMISSIONER, VIRGINIA DEPARTMENT OF TAXATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Petition shows the critical importance of the issue this Court reserved in *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 n.5 (1987), to the federal statute that prohibits state tax discrimination against railroads, section 11503 of Title 49. The decision below seized on that issue to create an expansive exception to the statute, and that exception has already spread to other lower courts. The Virginia Tax Commissioner and the respondent Virginia localities (the "Localities") have in no way justified the Fourth Circuit's decision or the severe damage it will cause. Review by this Court is necessary to arrest that harm and to preserve the integrity of the remedial scheme Congress adopted.

I.

The question reserved in *Oklahoma Tax Commission*, and presented by the Petition, is straightforward. It is *not*, as Respondents suggest, whether a single methodology for valuing railroad property is mandated by the statute or is necessarily superior to all others. *See, e.g.*, Virginia Tax Commissioner's Brief ("VTC Br.") at 2; Localities' Brief ("Loc. Br.") at 1-2, 4-12. Rather, the question is whether a state's selected valuation methodology, even if uniform on its face, nonetheless violates section 11503 if it overvalues railroad property compared to other commercial and industrial property in that state. *See Oklahoma Tax Commission*, 481 U.S. at 463 n.5; Petition ("Pet.") at i, 13-16.

While the facts in *Oklahoma Tax Commission* did not present this issue, it was recognized even then as a question of potentially critical importance. *See* Pet. at 15-16. It was also addressed by the United States in its brief supporting certiorari in that case, which observed that the statute "prohibits *any* overvaluation of railroad property that results from an assessment rule or methodology that *—either on its face or as applied—*systematically determines excessive values for railroad property."[1] After *Oklahoma Tax Commission* held that section 11503 prohibits discriminatory overvaluation of railroad property, methodology-based discrimination quickly came to the fore. *See* Pet. at 6-7, 21-24.

Respondents strain to paint the issue differently. Shifting their focus from the inescapable proposition that a methodology may produce discriminatory effects—which even they concede—respondents pose a false question: whether there must be a single federally-mandated methodology for valuing railroad property. *See, e.g.*, VTC Br. at 2; Loc. Br. at 6-12.

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[1] Brief for the United States as Amicus Curiae in Support of Petitioner at 11, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986) (emphasis added).

Petitioners do not advocate such a single methodolgy, nor will such uniformity be an inevitable consequence of permitting methodology-based discrimination to be challenged. Petitioners have never claimed—nor do they now —that section 11503 requires a state to use any specific valuation methodology. They have only sought the opportunity to show the discriminatory effect of Virginia's "inventory and summation" methodology by using other, widely-accepted valuation techniques to test whether Virginia's methodology actually yields the "true market value" of railroad property. The Tax Commissioner concedes that there are "many accepted methods of determining the fair market value of land . . . and that more than one method often is used to estimate the fair market value of specific property at any given time." VTC Br. at n.4.[2] Respondents' claims that petitioners seek to impose a "unit" methodology are wrong and avoid the issue presented by the Petition.

All petitioners seek is the opportunity to show at trial that the particular methodology employed by Virginia in fact overvalues railroad property compared to other commercial and industrial property. Such discriminatory overvaluation is precisely what *Oklahoma Tax Commission* condemned, and nothing in the statute suggests that such

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[2] The Localities likewise acknowledge that there is no single "unit method," and that the term is applied to a number of distinct valuation methodologies. *See* Loc. Br. at 11 n.10. *See also* Pet. at 18 n.20. In any event, they are far off the mark in suggesting that the use of a "unit" method to test fair market value is somehow improper or inconsistent with section 11503. *See* Loc. Br. at 8. As they themselves concede, Congress was well aware that most states were using "unit" methodologies at the time it enacted section 11503. Loc. Br. at 12. Moreover, Congress fully accepted such approaches as measures of "true market value." *See* S. Rep. No. 445, 87th Cong., 1st Sess. 454 (1961). That fact also disposes of the Localities' argument that it is somehow improper to test valuations of railroad property under Virginia's methodology by comparing them to valuations that "unit" methodologies would yield. *See* Loc. Br. at 10.

discrimination should be immunized merely because it is inherent in the methodology employed. *See* Pet. at 13-18.[3] None of the arguments offered by the Fourth Circuit, or by respondents here, justifies the creation of such a safe harbor for discrimination.

II.

Respondents not only pose the issue wrongly. They also seek to obscure it with diversionary arguments. Respondents devote much of their briefs to defending Virginia's chosen taxing scheme. But whether the Virginia approach discriminates is an issue on the merits, one that can be addressed if—but only if—the Fourth Circuit is reversed and petitioners are given the opportunity to challenge that methodology under section 11503.[4]

In any event, the arguments in defense of Virginia's methodology are unpersuasive. The suggestion that Virginia's methodology cannot result in prohibited discrimination because both Virginia law and section 11503 speak in terms of "market value" (*e.g.*, Loc. Br. at 7-8) "ig-

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[3] The Localities' contention that section 11503 applies to discrimination that results from a methodology that "single[s] out railroad property for special treatment," but not to one that achieves its discriminatory effect in a less overt way (Loc. Br. at 12-13) finds no support in the statute and cannot be squared with *Oklahoma Tax Commission*.

[4] There is plainly no merit to the Tax Commissioner's claim that respondents were entitled to the summary judgment granted by the district court because "[p]etitioners failed to introduce competent evidence establishing any disputed facts" (VTC Br. at 11). While the district court found that there were no "genuine issues of material fact," that finding was based solely on the court's belief that "[e]xpert opinions are not sufficiently conclusive to create a factual issue" (Appendix to Petition ("App.") 13a). This was not relied on by the Fourth Circuit as a basis for its decision, and in any event is wrong as a matter of law. *See, e.g., Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985); *Sears Roebuck & Co. v. General Servs. Admin.*, 553 F.2d 1378, 1381-83 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977).

nore the ancient wisdom that calling a thing by a name does not make it so." [5] Respondents also ignore the Virginia Supreme Court's admission that the state's fair market value rule is honored more in the breach than the observance.[6]

Nor have respondents shown that Virginia's "inventory and summation" methodology for determining "fair market value" is incapable of resulting in discrimination against railroad property. Their analogy between the use of that methodology here and the use of sales of "comparable" land to value ordinary commercial and industrial property is a false one.[7] Indeed, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

Railroad operating property is unquestionably different from the property of other commercial and industrial enterprises. Once dedicated to rail service, it must in most instances continue to be used for that purpose, and rail service over that property can be ended only if strict regulatory standards for abandonment are met. *See* 49 U.S.C. § 10903 (1988). While a parcel of commercial or industrial property may readily be used for the same purpose as property that lies "across-the-fence" from it, a

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[5] *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976).

[6] *Richmond, F. & P. R.R. Co. v. State Corp. Comm'n*, 219 Va. 301, 306, 247 S.E.2d 408, 411 (1978) (citing *Southern Ry. v. Commonwealth*, 211 Va. 210, 214, 176 S.E.2d 578, 581 (1970) and *Washington County Nat'l Bank v. Washington Co.*, 176 Va. 216, 218, 10 S.E.2d 515, 516 (1940)).

[7] As the Petition explains, Virginia does not in fact apply the same methodology to railroad property as to other commercial and industrial property, but instead follows a hybrid approach that assumes that the "highest and best use" of railroad property is necessarily a *non*-rail use and then adds the value of rails and ties to that non-rail value. *See* Pet. at 7.

railroad right-of-way cannot.[8] This is, in fact, why "railroad property is not widely sold." Loc. Br. at 9. And when sales do take place, they are most often to other parties that must continue to conduct rail operations over the property, subject to the same restrictions.

In sum, respondents' arguments fail to prove that Virginia's chosen methodology does not discriminatorily overvalue railroad property. Those arguments are at most ones that could be weighed, together with opposing ones, if the railroads were given the opportunity that section 11503 affords them to show that Virginia's methodology yields forbidden discriminatory overvaluation.

While the Tax Commissioner's brief pursues a different tack, his arguments fare no better. They are in the main pleas of avoidance: collateral estoppel, comity and abstention. VTC Br. at 14-22. But the Fourth Circuit expressly noted that "[n]o issues of collateral estoppel appear to have been raised." App. 4a n.2. There was not even any mention of comity or abstention in the proceedings below, and those arguments thus cannot be properly raised before this Court.[9]

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[8] In an effort to obscure these facts, the Localities portray the sale of land that was formerly within petitioner Richmond, Fredericksburg & Potomac Railroad Company's Potomac Yard as proof that railroad operating property has the same value as adjacent commercial real estate. *See* Loc. Br. at 8-9 & n.8. The effort to portray Potomac Yard as the paradigm of railroad operating property in Virginia fails on its own terms. Even at the 420-acre size used by the Localities (Loc. Br. at 9 n.8), the entire yard would, at the standard right-of-way width of 100 feet, be comparable only to a 35-mile line of railroad—roughly the distance from the Potomac River railroad bridge at Washington, D.C. to Quantico, Virginia. There are, by contrast, over 3,000 miles of railroad lines in Virginia. *See* Rand McNally Handy Railroad Atlas at 61 (1988). There are over 175,000 miles of rail lines in the Nation as a whole. *See* Association of American Railroads, Railroad Facts at 3 (1991).

[9] *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (alternative ground for affirmance must be properly raised below); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 n.17 (1980) (same).

More important, the Tax Commissioner's arguments cannot bar a claim under section 11503. There plainly is no basis for collateral estoppel here.[10] As to abstention, the only court of appeals ever to order it in a section 11503 case vacated its abstention order on rehearing after this Court's decision in *Oklahoma Tax Commission*, implicitly recognizing that abstention could not be reconciled with that decision. *Atchison, T. & S.F. Ry. v. Board of Equalization*, 828 F.2d 9, 10 (9th Cir. 1987), *vacating* 795 F.2d 1442 (9th Cir. 1986).[11] And *Oklahoma Tax Commission* itself squarely rejected arguments based on comity, observing that

> [t]hese are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

481 U.S. at 464.

III.

Respondents display a telling reluctance to defend the Fourth Circuit's decision on its own terms or to confront its inconsistency with this Court's decision in *Oklahoma*

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[10] The state court litigation the Commissioner cites only determined that a "unit" methodology was not authorized by Virginia law. *See, e.g., County Bd. v. Commonwealth*, 240 Va. 108, 113-14, 393 S.E.2d 194, 197 (1990). The issue under section 11503, by contrast, is whether the methodology actually used by Virginia—or any other state—produces discrimination that is prohibited by federal law. There plainly was no occasion for the railroads to raise the latter issue in the state court litigation, where the *Localities* were challenging the Tax Commissioner's use of a methodology that did *not* discriminate against railroad property.

[11] The United States argued in *Oklahoma Tax Commission* that the Ninth Circuit's abstention ruling was "incorrect, and that holding in some circumstances could have much the same practical effect on railroads as the Tenth Circuit's erroneous ruling as to jurisdiction [with respect to overvaluation claims] here." Brief for the United States as Amicus Curiae in Support of Petitioner at 12, *Oklahoma Tax Commission*, No. 86-337 (Sept. 1986).

Tax Commission. The Tax Commissioner's brief dwells on issues the Fourth Circuit neither decided nor addressed, and falls back on a variety of assertions that go to the merits of the controversy. The Localities do little more to support the Fourth Circuit's reasoning. Recognizing that the decision below lacks substance on its own terms, they look instead to the district court decision on which the Fourth Circuit largely relied, *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543 (D. Utah 1988). As petitioners have shown, however, *Union Pacific* only serves to make more evident that a "methodology" exception cannot be reconciled with the statutory language, its legislative history or this Court's decision in *Oklahoma Tax Commission*. *See* Pet. at 18-19 & n.22.

What is even more telling is respondents' inability to square the Fourth Circuit's reasoning with *Oklahoma Tax Commission*. They completely ignore the Court's analysis of the statute's terms and the tasks Congress has assigned to the federal courts in applying it, including the independent determination of true market values.[12] Indeed, the Tax Commissioner does not even cite *Oklahoma Tax Commission*, let alone attempt to reconcile the decision below with it.

IV.

The hole the Fourth Circuit has opened in section 11503 affects not just petitioners but railroads—and therefore shippers and consumers—across the Nation. As the Association of American Railroads explains, the risks of discriminatory taxation are grave and the stakes large.[13] In light of the long history of discriminatory state taxes on railroads—and the pressing financial problems of states and localities today—the Fourth Circuit's

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[12] As the Court concluded, in order to apply section 11503, "it is necessary to determine what the 'true market values' are." *Oklahoma Tax Commission*, 481 U.S. at 461.

[13] *See* Brief Amicus Curiae of the Association of American Railroads in Support of Petitioners at 13-15.

decision is a seductive invitation to develop discriminatory property tax methodologies. *See* Pet. at 11-13, 24.

The Localities concede the possibility of such discriminatory methodologies, but suggest that any "regulatory gap" the decision below might create can be addressed under the Equal Protection Clause of the Fourteenth Amendment. Loc. Br. at 12-13 & n.11. That suggestion only serves to underscore the violence the Fourth Circuit has done to the statute, for it was largely because constitutional remedies had not dealt adequately with the problem of state tax discrimination against railroads that Congress enacted section 11503.[14]

As petitioners have shown, states have sought relentlessly to devise means of shifting tax burdens from resident voters to railroads whose property is essentially immovable from the jurisdiction. *See* Pet. at 3-7, 11-12. Even after section 11503's enactment, states have tried to find some angle, some new mechanism, for continuing to impose discriminatory tax burdens on railroads. Faced with their own fiscal demands and voter opposition to tax increases, states will not be blind to what the decision below offers.

It will not do to say that there will be time enough to repair the harm to section 11503 and the railroads once methodological discrimination is rampant. *See* Loc. Br. at 14. The Fourth Circuit's faulty reasoning has already taken root elsewhere, and promises to engender a good deal more litigation. *See* Pet. at 13, 21-24. And although it purports to avoid methodological inquiries altogether, the Fourth Circuit's rule invites confusion in distinguishing "methodology" from "application," confusion that has already begun to vex the lower courts. *See id.* at 19-21.

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[14] *See* Pet. at 21 n.24. Indeed, two members of this Court counseled the need for a statute, such as section 11503, containing specific standards and mechanisms for curbing such discrimination. *Id.*

In these circumstances, with the harms that will be caused by the Fourth Circuit's decision already evident and with the risk to the statute severe, there is every reason for prompt review by this Court.

CONCLUSION

For these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

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